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JUSTICE OF THE PEACE REPORTS

VOLUME 122

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, JJ.)

October 9, 16, 1957

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER UNITY FRIENDLY SOCIETY v. MANCHESTER CORPORATION

Rating—Relief—Organisation whose main objects are concerned with advancement of social welfare—Friendly society—Society not established or conducted for profit—Insurance and other benefits payable to members and non-members—Rating and Valuation (Miscellaneous Provisions) Act, (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

The income of a friendly society was derived, in the main, from members' contributions and investment funds, and, to a lesser extent, from fines, donations and levies. The society was not established or conducted for profit. Its objects, as set out in one of its rules, were to provide for the payment of insurance and other benefits to members, the benefits being calculated on an actuarial basis, though in certain cases the society had a discretionary power to pay a benefit to a member not otherwise entitled to it, and a member who was in default with contributions might still receive a benefit. Provision was made also for payments for the relief and benefit of certain non-members—in substance, the families of members. The society claimed relief from rates under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a hereditament occupied by it as its head and registered office, on the ground that the society was an organisation whose main objects were charitable or otherwise connected with the advancement of social welfare.

HELD, that the society did not come within the provisions of the sub-section entitling it to relief as its main objects were not the advancement of social welfare, but the carrying into effect of a mutual insurance business.

Trustees of the National Deposit Friendly Society v. Skegness Urban District Council (ante p. 576), applied.

CASE STATED by the recorder of Liverpool.

By a notice of appeal dated May 14, 1956, the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter referred to as "the society"), appealed against a rate in the sum of £1,197 made for the year 1956-57, by the corporation of the city of Manchester (hereinafter referred to as "the rating authority"), in respect of a hereditament situated at 93-97, Grosvenor Street, Manchester, on the grounds that the society was an organisation which came within s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and was entitled to the relief from liability provided by that section.

At the hearing at Manchester Quarter Sessions on Jan. 3, 1957, the following facts were found. The hereditament was occupied by the society, and was used as its head office and registered office. The society was founded in 1851 and was registered under the Friendly Societies' Acts, being first registered on Aug. 8, 1851. The membership of the society, at all material times, was six million, and was divided into various classes. Ordinary members were admitted to the

society on being proposed by a member in lodge and elected by a majority of members present and voting at the lodge meeting; members were also required to sign a declaration set out in the rules and to undergo an initiation ceremony. The rules of the society, which were effective at all material times, were contained in a book of rules published in 1949, as amended in 1954 and 1955, and the objects of the society were set out in r. 2 of the book of rules. The first two objects of the society set out in r. 2 of the rules were to provide by entrance fees, contributions of the members, fines, donations, levies, and interest on capital for (a) insuring a sum of money to be paid on a member's death, or death of a member's wife or husband, or effecting certain other insurances, and (b) insuring a sum of money to be paid on the birth of a member's child. Other objects were set out in the subsequent eleven paragraphs. The society furthered all its objects by its activities. The society's income and capital funds were made up not only from members' contributions, interest from investments, but also from moneys received by fines, donations and levies. The objects and activities of the society included the provision of discretionary benefits both to members and to persons other than members, viz., their wives, children, fathers, mothers, brothers, sisters, nephews and nieces, orphans and wards being orphans. In certain circumstances the right of a member or his wife to receive benefits might be suspended and a member could be expelled from the society and required to accept the surrender value of insurance effected by him.

Persons joined the society and contributed to its funds in order to obtain for themselves or such non-members as have been mentioned previously the benefits which the society disbursed as of right or by way of discretion. Benefits payable to members as of right were only payable if the members' contributions had been paid or dealt with in accordance with the society's rules. Between 1905 and 1954, the society's capital had increased from £13,000,000 to £34,000,000, and in recent years, the investment income had greatly exceeded the amount of members' contributions. There was a surplus of assets over liabilities which amounted in 1954 to £3,801,000; out of this sum £1,000,000 was appropriated by the lodges of the society under its rules and used to provide benefits and benefit funds for members and such non-members as were eligible for benefit, the benefits being discretionary in character. The society's capital included capital which was appropriated to various benefit funds from which discretionary benefits or grants to members and such non-members as were eligible were made. The cash benefit fund, which amounted to £1,148,111 at Dec. 31, 1954, was a savings or pure endowment fund for the provision of benefits with no element of life assurance in it. The society was not established or conducted for profit, and was not a charity.

It was contended by the society that it was an organisation not established or conducted for profit, whose main objects were concerned with the advancement of social welfare, and that the hereditament which it occupied was one to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied. It was contended by the rating authority that the society was no such organisation.

The Crown Court at Manchester, as court of quarter sessions for Manchester, allowed the society's appeal on the ground that the main objects of the society were concerned with the advancement of social welfare. The rating authority now appealed from that decision.

Rowe, Q.C., and Hinchliffe for the rating authority.

Sir Andrew Clark, Q.C., and Glidewell for the society.

Cur. adv. vult.

Oct. 16. **ASHWORTH, J.**, read the following judgment of the court: This is an appeal from a decision of the learned recorder of the City of Liverpool sitting at Manchester as a court of quarter sessions whereby he held that the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter referred to as the society) being conducted otherwise than for profit was entitled to the relief in respect of rates conferred by s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being a body of persons whose main object was the advancement of social welfare. It is only fair to mention that this decision was given on Jan. 3, 1957, before *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) had come before this court or the Court of Appeal.

In our view, unless there are valid reasons for distinguishing this case from *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1), the present appeal must be allowed and as was to be expected, the argument of counsel for the society was largely directed to the establishment of such reasons.

The objects of the society are set out in r. 2 of its rules, and counsel for the society's first point was that three at least and possibly six of these objects could properly be described as charitable, whereas none of the objects of the society involved in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) could be so described. The problem, however, is to ascertain the main objects of the organisation, and even if it be the fact that some of its objects are charitable the society is not within the sub-section if its main objects are outside it.

Secondly, it was pointed out that in the present case benefits are not confined to members, whereas in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) they were. Although the rules do not appear to preclude the provision of benefit to persons who are unconnected with the society or its members, it seems to us that in substance the class of potential beneficiaries may be described as comprising members and their families. Thirdly, it was said that in the present case the society's benefits are derived from a number of sources, including donations, whereas in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) they were derived only from members' contributions. In this connexion, however, our attention was drawn to the summary of income and expenditure for the year 1954 set out on p. 56 of the November, 1955, report issued by the society from which it appears that the society's total income for that year was approximately £2½ million, of which £550,000 was derived from contributions, £867,000 from interest, nearly £800,000 from other funds, and only £55,000 from "other income". It is in our view clear that the society's income is derived to a very large extent from contributions and accumulated funds and that the amount received by the society from sources other than members or past members is relatively small. Fourthly, it was contended by counsel for the society that in the present case benefits are discretionary, whereas in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) they were calculated actuarially. In our view this contention cannot be maintained in the face of the elaborate tables of contributions and benefits included in the book of rules, all of which appear to have been prepared and certified by an actuary. While it may be true that in certain circumstances a discretion is conferred by the society's rules for the purpose of enabling a payment of benefit to be made to a person who would not otherwise be entitled to it, there cannot be any doubt

but that the society's benefits are in substance calculated and paid on an actuarial basis. The fifth point of distinction related to the effect of default in payment of contributions: in the present case a member in default may receive a discretionary benefit whereas in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) default appears to have disentitled a member to any benefits.

Lastly, counsel for the society cited the decision of KEKEWICH, J., in *Re Buck. Bruty v. Mackey* (2), as authority for the proposition that it is possible for a friendly society to be in law a charity. It was not contended that the society involved in this appeal is a charity, but the decision in question was relied on as an answer to an impression, which might be created by the last paragraph of the judgment of the Court of Appeal in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1), that friendly societies were altogether outside the scope of s. 8 (1) (a). In the paragraph in question the court did not purport to lay down any universal rule in regard to friendly societies, but adopted the view expressed in this court that, if friendly societies were to receive the relief conferred by the sub-section, it was remarkable that Parliament did not so provide in plain terms. That is still the view of this court.

In deference to counsel for the society's argument we have mentioned all the grounds on which he sought to distinguish *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1), but in our view no valid distinction can be drawn between the two cases. Such differences as exist are insufficient to afford a distinction between the main objects of the respective societies, and the deciding factor in each case must be the main objects of the society. While it is true that in the present case the class of person who is eligible for benefit is wider than in *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (1) and includes non-members, we do not think that this is sufficient to convert the main objects of the society from being the carrying into effect of a business arrangement in the form of mutual insurance into the advancement of social welfare.

For these reasons this appeal succeeds and the answer to the question raised in the Case Stated is that the rate should remain unaltered in the sum of £1,197.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Manchester; *Forsythe, Kerman & Phillips*, for John Gorna & Co., Manchester.

T.R.F.B.

(1) ante p. 567; [1957] 3 All E.R. 199.

(2) 60 J.P. 775; [1896] 2 Ch. 727.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND HAVERS, JJ.)

October 15, 16, 1957

NOTTINGHAM AREA NO. 1 HOSPITAL MANAGEMENT COMMITTEE
v. OWEN

Public Health—Nuisance—Statutory nuisance—Black smoke from chimney—Hospital premises—Hospital under National Health Service scheme—"Premises occupied for the public service of the Crown"—No jurisdiction in justices to hear complaint—Public Health Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 49), s. 106.

A complaint was preferred at a magistrates' court against the appellants, a hospital management committee, alleging that on July 12, 1955, a notice under the provisions of the Public Health Act, 1936, to abate a nuisance arising at the hospital (which had been transferred to the Minister of Health under the National Health Service Act, 1946) from a chimney emitting black smoke in such quantity as to be a nuisance was served on the appellants, being the persons by whose default the nuisance arose, and that the appellants had made default in complying with the requirements of the notice. Objection was taken on behalf of the appellants before the justices that they had no jurisdiction to entertain the complaint by reason of s. 106 of the Public Health Act, 1936, it being submitted that the hospital premises were "premises occupied for the public service of the Crown." The justices overruled the objection, held that they had jurisdiction, and made an order that the appellants should within four calendar months of the service upon them of the order or a copy thereof execute all works necessary to abate the nuisance. On appeal to the Divisional Court,

HELD: that the hospital premises were such as were required and created by statute, and, being provided under the National Health Service Act, 1946, were provided for the public service of the Crown; and, therefore, they were "premises occupied for the public service of the Crown" within the meaning of s. 106 of the Public Health Act, 1936, and the justices had no jurisdiction to hear the complaint.

Dictum of Lord Westbury in *Mersey Docks v. Cameron* (1865), 11 H.L. Cas. 443, 504, applied.

CASE STATED by justices for the city of Nottingham.

On Mar. 1, 1957, the respondent, Thomas Joseph Owen, town clerk of the city of Nottingham, acting on behalf of the council of the city, which was the local authority, preferred a complaint under s. 103 of the Public Health Act, 1936, against the appellants, the Nottingham Area No. 1 Hospital Management Committee (hereinafter referred to as the hospital management committee), in the following terms:—

"that on July 12, 1955, a notice under the provisions of the Public Health Act, 1936, to abate a nuisance arising at the General Hospital, Nottingham, from a chimney (not being a chimney of a private house) emitting black smoke in such quantity as to be a nuisance, was duly served on the Nottingham Area No. 1 Hospital Management Committee of the General Hospital, Nottingham, being the person by whose default the said nuisance arose. And that the said Nottingham Area No. 1 Hospital Management Committee have made default in complying with the requirements of the said notice. And the complainant now applies that the Nottingham Area No. 1 Hospital Management Committee shall be summoned to answer the said complaint and to show cause why an order should not be made requiring the Nottingham Area No. 1 Hospital Management Committee to comply with the requirements of the said notice or otherwise to abate the said nuisance and to execute any works necessary for the purpose and prohibiting a recurrence of the said nuisance."

The complaint was heard on Mar. 15, 1957, at Nottingham City Magistrates' Court, when the hospital management committee made a preliminary submission that the justices had no jurisdiction to hear the complaint. They contended that, under the National Health Service Act, 1946, the hospital was Crown property and occupied for the public purposes of the Crown, that they were agents of the Sheffield Regional Hospital Board who themselves were agents of the Minister of Health (by virtue of s. 12 of the Act of 1946), and were financed by money received from Parliament, and that s. 106 of the Public Health Act, 1936, dealt specifically with a smoke nuisance on premises occupied for the public service of the Crown and provided a special procedure therefor which must be followed by the local authority. For the respondent, it was contended that the complaint was not issued against the Crown, but against the hospital management committee who, under s. 13 of the National Health Service Act, 1946, were liable as principals in respect of liabilities incurred in the exercise of their functions, and who were the occupiers of the hospital for the purposes of the hospital management committee; and further, under s. 93 of the Act of 1936, the primary duty to abate a nuisance was on the person whose act or default caused it, and that the default in the present case was that of the hospital management committee.

The justices decided that they had jurisdiction to hear the complaint, and found the following facts. A serious nuisance existed owing to the omission of black smoke from the chimney of the hospital. Notice to abate the nuisance was served on the hospital management committee, who knew that the nuisance had existed for more than seven years. The nuisance was caused by the failure to install suitable and sufficient boilers and grit arresting plant and to keep the steam load within the rated capacity of the boilers.

The justices came to the conclusion that the complaint was true and ordered the hospital management committee to execute all works necessary to abate the nuisance within four months of service of the order on them. The hospital management committee appealed, and the question for the court was whether the justices had jurisdiction to hear the complaint.

Rodger Winn for the appellants, the hospital management committee.

Elson Rees for the respondent.

LORD GODDARD, C.J., having referred to the terms of the complaint made against the appellant hospital management committee, and the findings of the justices continued: The question that is raised by the Case Stated is whether or not the justices had jurisdiction to hear the complaint in view of the provisions of s. 106 of the Public Health Act, 1936. I am bound to say that it is with some regret I have come to the conclusion that the justices had not jurisdiction and that this appeal will have to be allowed. I say that because it is quite clear that if this hospital had remained a voluntary or municipal hospital and had not become, by virtue of the National Health Service Act, 1946, a hospital under the Minister of Health, the procedure provided under the Act of 1936 for the abatement of smoke nuisance would have been appropriate. It is a cheap, quick and simple method of providing for the abatement of nuisance and does away with the necessity of having to bring long and expensive actions; but the Minister of Health has chosen to take this point, and we have therefore to decide it.

It is submitted here that the hospital, being a hospital which is now vested in the Minister, constitutes premises occupied for the public service of the Crown, and we have, therefore, to see whether that is a well-founded submission. Before we consider the provisions of the National Health Service Act, 1946, it is necessary to look at the provisions of the Public Health Act,

1936. Certain sections in the Act of 1936 set out matters which were known as statutory nuisances. It was not every nuisance brought before justices in respect of which they had authority to make abatement orders, but there were certain nuisances which were prescribed by statute as being fit matters for this summary jurisdiction. Among them was what was known as smoke nuisance, that is to say the emission of large quantities of black smoke so as to be a nuisance and deleterious to the health of the neighbourhood. Certain provisions with regard to smoke nuisances are made by ss. 101 to 106 of the Public Health Act, 1936, where it is provided that if, in the opinion of the proper authority, a smoke nuisance exists by the emission of black smoke from chimneys which are not chimneys of private houses, proceedings can be taken before the justices and an application can be made for an order compelling the owner of the chimney to abate the nuisance. Section 106 of the Public Health Act, 1936, enacted a provision which did not appear there in the statute book for the first time but which is in the previous Public Health Acts, in substantially the same terms. It provides:

"If it appears to a local authority that a smoke nuisance within, or affecting any part of, their district exists on any premises occupied for the public service of the Crown, they shall report the circumstances to the appropriate government department, and, if the Minister responsible for that department is satisfied after due inquiry that such a nuisance exists, he shall cause such steps to be taken as may be necessary to abate the nuisance and to prevent a recurrence thereof."

Therefore, it seems clear under that section that the simple and speedy procedure which can be taken against private persons in respect of a smoke nuisance cannot be taken in respect of the emission of smoke from premises which are occupied for the public service of the Crown. The duty is then on the local authority to report the matter to the Minister, and it is left to the Minister, if he is satisfied that a nuisance exists, to take such steps as may be necessary to abate the nuisance; but it does seem that this only applies to summary proceedings taken under the Act of 1936, and does not prevent the local authority bringing an action for an injunction or the abatement of a nuisance, though it is not necessary to decide this. Thus, the question which we have to decide is whether this hospital comes within the expression "premises occupied for the public service of the Crown."

The National Health Service Act, 1946, s. 1, provides:

"It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act."

One of the services that has to be provided is hospital accommodation and hospital treatment, and s. 3 (1) of the Act of 1946 provides:

"As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation . . ."

Section 6 of the Act of 1946 provides for the transfer of hospitals to the Minister, who becomes the owner of the hospitals; by s. 7 (3) of the Ministry of Health Act, 1919, it is provided:

"For the purpose of acquiring and holding land, the Minister for the time being shall be a corporation sole by the name of the Minister of Health, and all land vested in the Minister shall be held in trust for His Majesty for the purposes of the Ministry of Health."

So once this hospital was transferred to the Minister under the National Health Service Act, 1946, it seems to be clear that he held it in trust for the Crown.

The Act of 1946 then goes on to provide how the Minister is to carry out his duties, and different provisions apply to teaching hospitals from those applying to general hospitals but, without going into the matter in too great detail, it is provided by s. 11 (1) of the Act of 1946, that the Minister "shall by order constitute, in accordance with Part I of sched. III to this Act, boards, to be called regional hospital boards . . ." These boards have functions with respect to hospitals and specialist services, and by s. 11 (3) it is provided:

"Every regional hospital board shall, within such period as the Minister may by direction specify, submit to the Minister a scheme for the appointment by them of committees, to be called hospital management committees, for the purpose of exercising functions with respect to the management and control of individual hospitals or groups of hospitals, other than teaching hospitals, providing hospital and specialist services in the area of the board."

It is not disputed that in Nottingham, for the administration of the present hospital, there is a Nottingham hospital management committee. By Part 4 of Sch. 3 to the Act of 1946 both the regional board and the appellant hospital management committee are made corporations, so that they carry out the administration of this hospital as corporate bodies, subject of course to the control of the Minister, and carry it out on behalf of the Minister, whose duty it is to provide hospital accommodation.

When one comes to s. 106 of the Public Health Act, 1936, the first thing that is to be noted is that the section applies to premises occupied for the public service of the Crown and not to the occupiers; that is to say, it does not matter who occupies the premises. If they are occupied for the public service of the Crown the section applies, and there is no doubt that the occupiers of these premises were the hospital management committee. As the hospital management committee, they are carrying out the duties which are imposed on the Minister, and I should find it very difficult to say that, considering that the hospital service is provided by the Minister in pursuance of his duty to carry out the provisions of the National Health Service Act, 1946, this is not a public service of the Crown. At a late stage in this case counsel for the hospital management committee called our attention to an authority which seems to be of assistance. It is a quotation from the speech of LORD WESTBURY, L.C., in *Mersey Docks v. Cameron* (1) where he said:

"At last in the case of the *Tyne Improvement Comrs. v. Chirton* (2) the Court of Queen's Bench recurred to that which is in my opinion the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule, that the Sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required

(1) (1865), 29 J.P. 483; 11 H.L. Cas. 443.

(2) (1859), 1 E. & E. 516.

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for its maintenance), is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown."

These premises are such as are required and created by the Act of 1946 for the government of the country, and are deemed to be part of the use and service of the Crown. In my opinion it would be impossible to say that the provision of hospitals for the purposes of the National Health Service Act, 1946, and the carrying on of a hospital is not for the public service of the Crown, and, therefore, I think that these premises are occupied for the public service of the Crown. As I say, I have some regret in this matter. This nuisance has been going on for a very long time. If the hospital had remained as it was before the Act of 1946, there is no question but that the justices would have had jurisdiction to act in the way they did, and I can well understand their believing that the hospital management committee were amenable to their jurisdiction but, for the reasons I have endeavoured to state quite shortly, I am of opinion they were not, and therefore this appeal must be allowed.

DONOVAN, J.: I agree. I think that the provisions of s. 106 of the Public Health Act, 1936, apply, and they are too strong in their terms for the respondent.

HAVERS, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health; Sharpe, Pritchard & Co., for Town Clerk, Nottingham.*

T.R.F.B.

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COURT OF APPEAL

(JENKINS, PARKER AND PEARCE, L.J.J.)

October 17, 1957

MONMOUTHSHIRE COUNTY COUNCIL v. BRITISH TRANSPORT COMMISSION

Highway—Repair—Bridge carrying road over railway—Diversion roads along embankment linking old road to bridge—Embankment slipping into railway cutting—"Immediate approaches" of the bridge—Liability to repair—"Necessary works" connected with bridge—Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), s. 46.

By a private Act of 1847, which incorporated the Railways Clauses Consolidation Act, 1845, a railway company was authorised to construct an extension to their railway. The extension crossed a turnpike road, which has since become a county highway. The company built a bridge to carry the road over the railway, and so comply with s. 46 of the Railways Clauses Consolidation Act, 1845, which provides that "if the line of the railway cross any turnpike road or public highway, then . . . such road shall be carried over the highway . . . by means of a bridge . . . and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company . . ." The railway constructed two stretches of diversion road, one at each end of the bridge, one approximately 143 yards and the other approximately 367 yards long, to connect the bridge with the road. These diversion stretches ran along the embankment of the railway cutting. Part of the embankment at the end furthest from the bridge of the longer of these diversion stretches began to give way, and thus endanger the road. The highway authority (the Monmouthshire County Council) sued for a declaration that the British Transport Commission, as successor to the liabilities and obligations of the railway company, was liable to repair the diversion roads and the embankment along which they ran, and for an order directing the commission to carry out the necessary repairs.

HELD: the railway company (and, therefore, the commission) were not liable to repair that part of the embankment and road which were in disrepair, because (i) they were too distant from the bridge to be its "immediate approaches"; (ii) the required repairs were not "necessary works connected" with the bridge or its immediate approaches because they were necessary for the railway company's embankment, and not for the bridge.

Per PARKER, L.J.: "Necessary works connected therewith" are really matters such as buttresses and revetments and the like, which are directly, and not indirectly, connected with the structure of the bridge.

APPEAL by the highway authority for the county of Monmouth, the Monmouthshire County Council, against the decision of LORD GODDARD, C.J., dated Feb. 13, 1957, and reported 121 J.P. 224, dismissing their action for (i) a declaration that the British Transport Commission, as successors in title of the Newport, Abergavenny and Hereford Railway Company, were liable, on the true construction of s. 46 of the Railways Clauses Consolidation Act, 1845, to maintain a bridge over the railway and a diversion road which ran along an embankment on each side of the bridge at Maesywmmmer in the county of Monmouth, and (ii) an order directing the British Transport Commission, forthwith and at their own expense, to carry out, on the diversion road, any works required for the reconstruction and reinstatement of the embankment and any supplementary works necessary to repair and maintain the road and footpath on the embankment.

The facts appear in the judgment of JENKINS, L.J.

Harold Williams, Q.C., and Marnham for the Monmouthshire County Council, the highway authority.

Cross, Q.C., and Francis for the British Transport Commission, the successors to the railway company.

JENKINS, L.J.: This is an appeal by the highway authority for the County of Monmouth, the Monmouthshire County Council, the plaintiffs in the action, from a judgment of LORD GODDARD, C.J., in favour of the defendants, the British Transport Commission, in an action brought for the purpose of determining the extent of the liability of the British Transport Commission for repairs or maintenance in relation to a bridge over a railway. The railway in question was constructed under the Newport, Abergavenny and Hereford Railway (Extension to Taff Vale Railway) Act, 1847, by the company of that name, which was a predecessor in title of the British Transport Commission. The operations of the Newport, Abergavenny and Hereford Railway Company were subject to the provisions of the Railways Clauses Consolidation Act, 1845, and the British Transport Commission succeeded to its obligations under those provisions.

The extension of the railway, which is in Wales, included a section running eastwards from a place called Maesycwmmer, which is in the county of Monmouth. The land on which this section of the railway was to be constructed sloped considerably downwards from east to west, and at the eastern end of the section with which we are concerned it entered a tunnel. The proposed line of the railway for some distance from Maesycwmmer ran to the north of an existing road, and further on the line of that existing road actually coincided for a considerable distance with the proposed line of the railway. The fall of the ground demanded that the railway should be run in a cutting, and it was obviously necessary to provide an alternative site for the road, inasmuch as the cutting was for a considerable part of its length actually to be on or include the site of that road.

In these circumstances, the railway company executed works of the following nature. They made a diversion of the existing road by substituting a new section of road which (considered from east to west) ran for some distance, approximately four hundred yards, from the point at which it left the old road, westwards and to the north of the railway, and then turned south, crossing the railway at an angle by means of the bridge with which this case is concerned, and then, turning west again, rejoined the old road. The railway being, as I have said, in a cutting, the diversion road ran along the top of the embankment of that cutting, and the matter which is complained of by the highway authority is that parts of this embankment towards the eastern end of the diversion road (i.e., the end furthest from the bridge) are beginning to give way, and it is said that this is, or will become, a source of danger to the road.

The question in the case is whether, having regard to the terms of the relevant provisions of the Railways Clauses Consolidation Act, 1845, these defects in the embankment fall within the British Transport Commission's liability for the maintenance of the bridge or of the approaches to or other works connected with the bridge, to put the matter at this stage in a neutral form. The Lord Chief Justice took the view, having considered the relevant enactments, that the want of repair complained of was outside the scope of the British Transport Commission's liability to maintain bridges and connected works. On the other hand, it is contended by the highway authority that the diversion road was part of the work of constructing the bridge and its approaches, as it was a necessary incident of the bridge in the sense that access would be had to the bridge by passing along it. That is the nature of the dispute between the parties, and I should next refer to some of the provisions of the Act of 1845.

The first of the sections to which we were referred was s. 16, which has the sidenote "Works to be executed", and provides that:

"Subject to the provisions and restrictions in this and the special Act

... it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works . . .";

then the company is authorised, *inter alia*, to construct in under or over, *inter alia*, any roads such inclined planes, tunnels, embankments, bridges, roads and ways as they think proper. Next the section deals with the alteration of course of rivers, etc., and under that part of the section the company may alter the course of any rivers, streams or watercourses, and may

"... divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways . . ."

as they may think proper. That section, therefore, gives a general power to divert roads as well temporarily as permanently. Then s. 46, which is the one on which this case really turns, is in these terms. The sidenote is "Crossing of roads—Level crossings", and the section provides:

"If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

The provision about crossing on the level does not enter into this case, but I should say that the road here in question was admittedly a turnpike road at the time when the bridge was constructed, and is now route A.472 in the modern road classification. Section 50 contains further provisions about the construction of bridges carrying roads over highways. It provides:

"Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations; (that is to say,) There shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet."

There is a provision about width, and there is a provision about ascent, that is to say, the gradient of the road as it rises to the level of the bridge. Then s. 53 provides that if in the exercise of any of the relevant powers

"... it be found necessary to cross, cut through, raise, sink, or use any part of any road . . . so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be."

Finally, s. 56, which has the sidenote "Roads interfered with to be restored, or others permanently substituted, within a limited time", provides:

"If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced . . ."

Those are, I think, all the sections to which we were referred, and it may be said that on one view of the case the question here is whether the diversion road, which was constructed at the time when the bridge was built, was a substituted road within s. 56; that is to say, was it the case that the company found it necessary to substitute a new road for the old one? If so, then the company's liability to maintain that substituted road came to an end when the road put into permanently substantial condition was made available for the public. Or, on the other hand, is this diversion road part of the relevant works connected with the bridge so as to fall within s. 46 of the Act, that is to say, is it part of "such bridge, with the immediate approaches, and all other necessary works connected therewith"? If it falls within the language of s. 46, then the liability for maintenance imposed on the company with respect to the bridge must extend to the repair of the embankment of the cutting where its condition imperils the diversion road.

The question is one on which there is remarkably little authority. We are referred by counsel for the highway authority to a number of cases, beginning with *North Staffordshire Ry. Co. v. Dale* (1). The decision in that case was to the effect that the roadway over a bridge was part of the bridge, so that the railway company was obliged not only to maintain the structure of the bridge, but also the road surface going across it. Then, there were two Irish cases, *Waterford & Limerick Ry. Co. v. Kearney* (2), and *Fosberry v. Waterford & Limerick Ry. Co.* (3). Both these cases dealt with bridges which crossed over the road, so they were the converse of the present case. The upshot of them, with a dissent by HAYES, J., in *Waterford & Limerick Ry. Co. v. Kearney* (2), was that the obligation to repair did not extend to the roadway passing under the bridge. Then there was *London & North Western Ry. Co. v. Skerton* (4), which was to the same effect as the Irish cases, that is to say, to the effect that a railway company who, in carrying a railway over a highway by a bridge, lowered the level of the highway, were not bound to keep the slope of the road in repair as being a part of the approaches on each side of the bridge. Then, in *Bury Corp'n. v. Lancashire & Yorkshire Ry. Co.* (5), the Court of Appeal followed *Dale's* case (1), the decision being to the effect that where a railway crosses a highway, and the road is carried over the railway by means of a bridge, the railway company are bound to keep in repair the roadway on the bridge, such roadway being part of the bridge which, by the section, the company are to maintain. That gives the approval of the Court of Appeal to the view of LORD CAMPBELL, C.J., in *Dale's* case (1).

(1) (1858), 8 E. & B. 836.

(2) (1860), 12 I.C.L.R. 224.

(3) (1862), 13 I.C.L.R. 494.

(4) (1864), 28 J.P. 518; 5 B. & S. 559.

(5) (1889), 54 J.P. 197; 14 App. Cas. 417.

None of these cases, of course, touched the present case, because this is not a case where the road goes under the railway, nor is the dispute confined to the question whether the company's liability for maintenance includes, or does not include, the actual roadway passing over the bridge. However, perhaps some assistance is to be derived from these observations in the judgments of LORD ESHER, M.R., and FRY, L.J., in the *Bury Corp'n.* case (1). The Master of the Rolls said:

"The substance of their view [that is the view of the court in *North Staffordshire Ry. Co. v. Dale* (2)] was this: here is a section dealing with certain specified cases in plain language, and, if that section is to be looked at alone, according to the plain meaning of the words, there could not be a doubt as to its effect: but then astute counsel suggested that it must be read in conjunction with other sections, and so endeavoured to bring a fog over its meaning. The court said that that was not the way to construe it; that, dealing specifically with particular cases, it must be taken by itself."

Then comes this important passage:

"One thing is quite clear, that, whatever works the section compels the railway company to execute, it likewise compels them to maintain for ever. The question is, therefore, what are they bound to execute under the section? The section does not refer to all bridges which they may have to make, but only to certain bridges, which they have to make under certain specified circumstances."

Then FRY, L.J., said this:

"So, again, the expression 'all necessary works connected therewith', must mean works necessary in the same sense as approaches are necessary. Approaches are necessary that vehicular traffic may use the bridge; and so all necessary works mean all works necessary to make the bridge an effective and useful part of the highway."

The Lord Chief Justice, after considering the various sections, and in particular s. 46, came to the conclusion, in effect, that this claim that the British Transport Commission were liable for the maintenance of the diversion road at the point where the alleged want of repair has arisen was not warranted by s. 46, the point in question being too remote from the bridge to make it reasonably possible to say that what is demanded was repairs either to such bridge or to its immediate approaches, or that this part of the road fell within the description of "all other necessary works connected therewith", that is to say, connected with the bridge. He said this at the conclusion of his judgment:

"I do not think that the part of the road and embankment with which I am concerned in this case come within s. 46. I cannot say that work done to prevent the embankment falling into the cutting is necessary work connected with the bridge, or with the approaches to the bridge. The embankment is there for the protection of the cutting; it is not there for the protection of the bridge."

There were a number of other authorities to which counsel for the highway authority referred us, but none of them, I think, really advances the argument one way or another. The question whether s. 46 applies in any particular case seems to me to a great extent to be a question of fact and degree.

(1) (1889), 54 J.P. 197; 14 App. Cas. 417.

(2) (1858), 8 E. & B. 836.

Counsel for the British Transport Commission puts his argument in this way. He says that liability to maintain under s. 46 is confined to works done under the section. He says that the new road and the cutting alongside which it ran were not works done under s. 46 at all, and that the works in the cutting, such things as retaining walls, were put there for the purpose of securing the banks of the cutting, and had nothing whatever to do with the bridge. He says, therefore, that the works in question obviously not being works forming part of the bridge itself, were not other necessary works connected with the bridge. He further maintains, that one could not reasonably hold that the part of the diversion road with which this case is concerned was part of the immediate approaches to the bridge. He suggests that the immediate approaches to the bridge comprehend nothing further from the bridge itself than the points at which the roadway begins to ascend on to the bridge, or at which the passenger going over the bridge once more reaches the general level of the road having descended from the bridge. I cannot, I confess, entirely follow that last argument, which is weakened in the present case by the circumstance that there are no points of ascent or descent at all. I should note, however, that it is to some extent supported by an interlocutory observation by MELLOR, J., in *London & North Western Ry. Co. v. Skerton* (1) to which the Lord Chief Justice referred with approval.

For my part, I prefer to found myself simply on the express terms of s. 46, and to say that on the facts of the case, having regard to the relative positions geographically of the bridge itself and of the diversion road, it cannot possibly be said without abuse of language that the relevant part of the diversion road was part of the immediate approaches to the bridge. The Lord Chief Justice called in aid s. 50 of the Railways Clauses Consolidation Act, 1845, which imposes certain obligations as to fencing. I have already read the section and I will not read it again, but I think there is force in his view that it can hardly have been intended that, in connexion with the erection of a bridge such as the bridge in the present case, the railway should be under a special obligation to fence the whole length of the diversion road.

The point is, when one reaches it, really a short point of construction, and I cannot usefully say any more than that in my view the proposed diversion road was, for the purposes of these statutory provisions, simply a diversion of the old road in the course of constructing the railway, and the fact that the diversion road at one end of its length joined the bridge over the railway cannot have the effect of converting for the purposes of the Act what was simply a diversion of the road into the "immediate approaches" of the bridge or into necessary works connected with the bridge. Of course, it is true that if there had been no diversion road, and if the old road had simply been got rid of, and the bridge had been built with no road across it at all, then no traffic would have been able to reach the bridge, so that reading, without regard to its context, the language of *Fry, L.J.*, in *Bury's case* (2):

"Approaches are necessary that vehicular traffic may use the bridge; and so all necessary works mean all works necessary to make the bridge an effective and useful part of the highway",

one might say that this brought the whole of the diversion road into the area of approaches. One cannot, however, press that reasoning too far; for otherwise one might find a railway company, on the strength of their having erected a bridge, made liable for the maintenance of several miles of roadway on either

(1) (1864), 28 J.P. 518; 5 B. & S. 559.
(2) (1889), 54 J.P. 197; 14 App. Cas. 417.

side of the bridge, because were it not for that roadway vehicular traffic could not reach the bridge at all. I think the answer to that line of argument is that the word "approaches" in s. 46 is qualified by the word "immediate", and one has to find here something that is an immediate approach to the bridge. I am fortified in the conclusion to which I have come by some answers given by the county surveyor (Mr. Cornish) in cross-examination by counsel for the British Transport Commission. The county surveyor was asked a number of questions in cross-examination which bear out the view that it could not be said that the diversion road and the cutting were made for the purposes of the construction of the bridge. It was necessary to have a bridge to take the road over the railway, and the siting of the line of the railway was such that it was necessary to divert the existing road. It cannot then be said that the cutting or the diversion road were mere incidents of the construction of the bridge.

For the reasons I have endeavoured to state, in my judgment the learned Lord Chief Justice, if I may say so with respect, was perfectly right in the conclusion to which he came, and I would dismiss this appeal.

PARKER, L.J.: I agree. In order to succeed, the highway authority must bring this case within s. 46 of the Railways Clauses Consolidation Act, 1845. Counsel seeks to do that, in the first instance, by saying that the road and the embankment in question formed part of the immediate approaches to the bridge. He goes so far as to say that "approaches" includes everything which the railway company had to alter in order to enable traffic to reach the bridge; in other words, he treats the whole of the road between "A" and "B" on the plan as approaches. I am quite unable to accept that, because it gives no effect to the words in the section "immediate approaches". Section 46 is dealing really with a point on the map, namely, a point where the road crosses the railway or the railway crosses the road, and it is dealing only with works at that point. I would also mention that it would be surprising if the contention of counsel for the highway authority were right, having regard to the obligation of the railway company under s. 50 to fence all the immediate approaches.

Secondly, counsel says that, if he is wrong on that point, this work comes within the words "all other necessary works connected therewith". It seems to me that on the facts of this case the works in question were necessary for the railway company's cutting, and not necessary for the bridge. Be that as it may, it seems to me again that the necessary works connected therewith are really matters such as buttresses and revetments, and the like, which are directly, and not indirectly, connected with the structure of the bridge, the words here being: "such bridge, with the immediate approaches, and all other necessary works."

For those reasons and the reasons given by my Lord, I would dismiss this appeal.

PEARCE, L.J.: I agree. The insertion of the word "immediate" in s. 46 of the Railways Clauses Consolidation Act, 1845, and the use of the word "with" instead of "and" are clearly intended to narrow the word "approaches". I cannot believe that the additional words "and all other necessary works connected therewith", were intended to bear a meaning which would in fact extend the ambit of the word "approaches", which had already been deliberately narrowed. In my view, the road and embankment in this case do not come within the section.

For the reasons which my Lords have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Overton & Blackburn, for Vernon Lawrence, Newport, Mon.; M. H. B. Gilmour.*

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COURT OF CRIMINAL APPEAL

JAN 28 1958

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

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May 6, 1957

R. v. PARKER

Road Traffic—Causing death by dangerous driving—Momentary act of negligence—Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67), s. 8 (1).

A momentary disregard of safety precautions or a momentary act of negligence on the part of the driver of a motor-vehicle may amount to dangerous driving within s. 8 (1) of the Road Traffic Act, 1956.

APPEAL against conviction.

The appellant was convicted at Lancaster Assizes on Jan. 29, 1957, before STREATFEILD, J., of causing death by dangerous driving, contrary to s. 8 of the Road Traffic Act, 1956 and was ordered to pay a fine of £50.

The appellant, an elderly man, was driving a motor-car along a main street in Blackburn at a busy time of day and came to a dangerous crossing where there were traffic lights. He crossed over when the lights were showing red in his direction and collided with a motor-bus, which had the right of way, as the lights were showing green in its favour. The rear end of the appellant's car was flung round, and struck and killed a man. The judge directed the jury that a momentary disregard of safety precautions or a momentary act of negligence on the part of a driver could amount to dangerous driving.

W. G. Morris for the appellant.

Kenneth Burke for the Crown.

The judgment of the court was delivered by

LORD GODDARD, C.J. The appellant appeals on the ground that there was a misdirection by the learned judge. The misdirection complained of is that the learned judge told the jury that the momentary disregard of safety precautions or a momentary act of negligence could amount to dangerous driving.

[His Lordship stated the facts as set out above and continued.] The questions for the jury were: Was there evidence on which they could find that the appellant was driving dangerously? Was the death of the deceased man caused by dangerous driving? The jury answered these questions in the affirmative. The question whether the appellant's driving was dangerous or not was essentially one for the jury. Defending counsel properly put all the considerations which he could to the jury, contending that they ought not to convict his elderly client because he was momentarily negligent. How it can be said that his conduct did not amount to dangerous driving it is difficult to see. In our opinion, the learned judge gave a perfectly proper direction. This court is not going to attempt to lay down what is or is not dangerous driving; it is a matter for the jury, who hear all the facts and then have to consider whether the accused person drove in a manner dangerous to the public, having regard to all the circumstances of the case. This is a hopeless appeal, and it is dismissed.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal; Director of Public Prosecutions.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, JJ.)

October 18, 1957

MACFISHERIES (WHOLESALE & RETAIL LTD.) v. COVENTRY CORPORATION

Food and Drugs—Food hygiene—Contamination—No injury to public health—Food and Drugs Act, 1955 (4 & 5 Eliz. 2, c. 16), s. 13 (1)—Food Hygiene Regulations, 1955 (S.I. 1955, No. 1906), reg. 8.

Section 13 (1) of the Food and Drugs Act, 1955, authorises the making of regulations "for securing the observance of sanitary and cleanly conditions and practices in connexion with . . . (b) the . . . exposure for sale . . . of food intended for . . . human consumption, or otherwise for the protection of the public health . . ." Reg. 8 of the Food Hygiene Regulations, 1955, made under the section, provides that "a person who engages in the handling of food . . . (a) shall not so place the food, or permit it to be so placed, as to involve any risk of contamination."

A company which carried on the business of retail fishmongers permitted fish and other food to be exposed for sale in a new shop designed and constructed in the most up-to-date manner. The company was prosecuted for permitting food to be so placed as to involve the risk of contamination, contrary to reg. 8 (a) and reg. 32 (3) of the regulations. The justices found that there was a risk of contamination to the food, e.g., from customers in the shop, but that the contamination was not of such a nature as to be injurious to the public health, and they convicted the appellants. On appeal against conviction,

HELD: that, the object of s. 13 of the Act of 1955 being the protection of the public health, the words "risk of contamination" in reg. 8 must be interpreted as being limited to risk of such contamination as was injurious to the public health, and, therefore, the justices should have found that no offence had been committed by the company.

CASE STATED by Coventry justices.

The respondents, the corporation of the city of Coventry, preferred eight informations against the appellants, MacFisheries (Wholesale & Retail) Ltd. (herein referred to as "the defendant company") alleging that, contrary to reg. 8 (a) and reg. 32 (3) of the Food Hygiene Regulations, 1955, made under s. 13 and s. 123 of the Food and Drugs Act, 1955, the defendant company on Feb. 1, 1957, at its shop in the Precinct in the city of Coventry, being a person who engaged in the handling of food, did permit food to be so placed as to involve the risk of contamination. The particulars of the food so placed were that on the main counter of the shop there were permitted to be placed uncovered fishcakes, uncovered cured fish, uncovered wet fish and uncovered crustacea; that on a food counter sited against the side wall on the public side of the counter there were permitted to be placed uncovered fishcakes, uncovered sausage and uncovered crustacea; and that in a part of the display window to which the public had access there were permitted to be placed uncovered wet fish.

The informations were heard at Coventry magistrates' court on April 17, 1957, when the following facts were found.

The defendant company was engaged in the handling of food. In December, 1955, the defendant company had opened a new shop in the Precinct, which was the new main shopping parade in the reconstructed centre of the city. The defendant company had spared no expense on equipment and fittings, which alone cost £8,000. The shop was a closed fronted shop and was one of the most up to date of its kind in the country, and in designing and constructing the premises the defendant company had acted in the best of good faith, adopting methods which in their judgment and experience were best suited to keeping fish fresh and to a shop of this description. The interior of the shop was shown

in photographs attached to the Case. On Feb. 1, 1957, many varieties of wet, cured and shell fish and sausages were displayed in open plastic trays on the two tiers forming the main counter extending along the whole length of the shop, on the shop window and on the shelf affixed to the wall on the customers' side of the counter. For the purpose of sale a selection of fish was put on view to prospective customers and comparatively small quantities were exposed in the trays at any one time. As this was a busy shop, the food was not normally so exposed for more than half to three quarters of an hour before it was sold, the trays being refilled by bulk supplies kept fresh and cool in airy conditions at the rear of the shop.

The justices found that the defendant company, while engaged in the handling of food, failed to take all such steps as were reasonably necessary to protect the food which was the subject of the informations from the risk of the contamination that is referred to in para. (ii), post and that the defendant company permitted the food to be so placed as to involve the risk of the contamination referred to in para. (ii), post. They further found—(i) on Feb. 1, 1957, the clothing of the customers when at or moving along the front of the main counter could come in contact with the food displayed, particularly when a purchase was made and the arm of the customer was extended over the food to the shop assistant at the rear of the main counter for the purpose of receiving the purchase, handing over the money or receiving change. These actions could, and on a number of occasions did, carry the loose clothing of the customer against the food and cause bags looped over the arm or rested on the basket rail in front of the main counter, to come in contact with the food. Customers and children could touch the exposed food either accidentally or by way of appraising the food or, in the case of children, mischievously or out of curiosity. The position with regard to the food on the other counters and the glass shelves was the same, except that the shop assistants did not serve from the rear. The faces of small children were level with and close to the exposed food. Customers and assistants spoke over, and might have sneezed or coughed over, the exposed food and some of them might have been carriers of infectious organisms. (ii) By reason of the circumstances set out previously in para. (i) there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health.

The defendant company contended (a) that the risk of contamination referred to in reg. 8 (a) of the Food Hygiene Regulations, 1955, was a risk of such contamination as was injurious to health and that unless such a risk of contamination was proved the defendant company was not guilty of the offences charged; (b) that para. (a) of reg. 8 was governed by the preceding words of the regulation and that an offence was committed only if it was proved both that there was a failure to take all such steps as might be reasonably necessary to protect the food from risk of contamination and that the food was so placed as to involve such risk, and (c) that there was no evidence to support a finding that the defendant company had failed to take all such steps as were reasonably necessary to protect the food from contamination. The corporation contended (a) that under reg. 8 the prosecution had to prove no more than a risk of contamination, but did not have to prove actual contamination or that such contamination, if it did occur, would be injurious to health; (b) that the prosecution did not have to prove that all reasonable steps to prevent a risk of contamination had not been taken, but that reg. 8 was absolute in that the person engaged in the handling of food must not place the food so as to involve a risk of contamination; and

(c) that there was evidence on which the court could conclude that actual contamination might have ensued.

The justices were of opinion that the risk of contamination referred to in reg. 8 was the risk of any contamination, whether or not it was injurious to health; they considered that the Ministers had power under s. 13 of the Food and Drugs Act, 1955, to make such regulations "as appear to them to be expedient for securing the observance of sanitary and cleanly conditions and practices in connexion with the sale of food . . .", that the Food Hygiene Regulations, 1955, were made for those purposes and that the words "otherwise for the protection of the public health" in s. 13 did not govern the provisions of the regulations. Accordingly they convicted the defendant company of the offences charged and imposed small fines. The defendant company appealed.

Griffith-Jones for the defendant company.

Wrightson for the corporation.

LORD GODDARD, C.J.: This is a Case stated by justices for the City of Coventry, before whom MacFisheries (Wholesale & Retail), Ltd. (herein referred to as the defendant company) were charged on eight informations preferred by the corporation that the defendant company "being a person who engages in the handling of food did permit food to be so placed as to involve the risk of contamination", contrary to reg. 8 (a) and reg. 32 (3) of the Food Hygiene Regulations, 1955. On the facts found by the justices, it seems that the defendant company are the largest fishmongers in Great Britain. They have four hundred and eighteen shops. They serve a million and a quarter customers a week, and they have never had a single complaint for unwholesomeness or improper storing or keeping of fish during the history of the company. They have lately opened in the city of Coventry what appears to be a remarkably fine and modern fish shop, and on the fittings alone they have spent, so the justices find, a sum of £8,000, and I do not think that anybody can say that they have not taken every precaution to make this shop the most modern and up-to-date shop that can be imagined.

The proceedings were based on reg. 8 of the Food Hygiene Regulations, 1955, which provides:

"A person who engages in the handling of food shall while so engaged take all such steps as may be reasonably necessary to protect the food from risk of contamination, and in particular (without prejudice to the generality of the foregoing)—(a) shall not so place the food, or permit it to be so placed, as to involve any risk of contamination; . . ."

The regulations were made under the Food and Drugs Act, 1955 and, in order to interpret the regulations it is necessary and desirable to have regard to what the statute says. The Ministers make the regulations to carry out the will of Parliament. Two Ministers, the Minister of Health and the Minister of Agriculture, Fisheries and Food, are concerned and s. 13 (1) of the Act of 1955 provides:

"The Ministers may make such regulations as appear to them to be expedient for securing the observance of sanitary and cleanly conditions and practices in connection with—(a) the sale of food for human consumption, or (b) the importation, preparation, transport, storage, packaging, wrapping, exposure for sale, service or delivery of food intended for sale or sold for human consumption, or otherwise for the protection of the public health in connexion with the matters aforesaid."

It is, therefore, quite obvious that the object of the statute, and therefore the

object of the regulations, is to procure the protection of the public health. Those words must be kept in mind when one is construing the regulations and when one is coming to a decision on them whether an offence has been committed.

The justices in this case have obviously given great care and attention to the case. They have stated the Case very fully in a way which enables the court to get a clear view of the reasons which moved the justices to decide as they did. They obviously did not think that it was a serious case, because they inflicted only nominal fines. Nevertheless, I differ from the justices because they have taken a view of the construction of the section which I do not think is justified, and thus there runs right through their decision, I think, a mistake which is vital.

I need not read the whole of the facts. If I did, it would show the extreme care which the defendant company used to provide a sanitary and up-to-date shop, and I do not hesitate to say that, if I had been sitting at first instance, I should have come to a different decision from that of the justices. However, that does not matter, because, if the justices have applied the right tests, this court does not interfere. The question here is whether the justices have applied the proper tests. The justices among other things find and state:

"By reason of the circumstances set out in para. 2 (g) hereof there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health."

Later on they say:

"We were of opinion:—(a) that the risk of contamination referred to in reg. 8 is the risk of any contamination whether or not it is injurious to health."

Then they ask this court the question:

"Were we correct in holding that the risk of contamination referred to in the said regulation is a risk of any contamination, whether or not it is injurious to health?"

The answer to that, in my opinion, is that they were not correct in so holding. For the reasons that I have pointed out it seems to me that the governing consideration in this case is the words of s. 13 of the Food and Drugs Act, 1955, and, therefore, the whole task here is to see whether there was contamination which was injurious to health. If there was not contamination which was injurious to health, there was no offence. I do not know whether it is possible that there can be an article of food exposed for sale (unless it is put in some hermetically sealed vacuum or compartment) regarding which there cannot be some risk of contamination. We are told that at various times there are epidemics and that infection is spread simply by persons being in a place affected thereby. I do not suppose that the wit of man, short of putting things in hermetically sealed compartments, will ever prevent some form of contamination, which means touching the thing in some way to make it injurious. However, what we have to consider is whether this food has been so exposed that there is a risk of contamination injurious to health, and the justices have found that there is not. They thought that whether the risk of contamination was injurious to health or not was immaterial, except, no doubt, for the purpose of penalty. It is, however, the one thing that is really material in the case, and as the justices have found here that any contamination to which this food was exposed in this very modern shop was not so injurious, they ought to have found that no offence was committed. Therefore, I would allow this appeal and quash the convictions.

DONOVAN, J.: I entirely agree, and I add one or two observations of my own merely because of the importance of the matter and in deference to the argument of counsel for the corporation.

Section 13 of the Food and Drugs Act, 1955, makes it clear that all these regulations are made for the purpose of protecting public health. Accordingly, the words "risk of contamination" in reg. 8 of the Food Hygiene Regulations, 1955, ought, in my view, to be construed as risk of such contamination as might be injurious to public health. I agree that the question is not whether it is a risk which has in fact damaged someone's health, since that would be locking the stable door after the horse had bolted, and the regulations have in mind, as counsel says, prevention rather than cure.

On that construction, the question in this case becomes: Was there a risk of contamination here to public health? In para. 2 (h) of the Case the justices find this:

"By reason of the circumstances set out in para. 2 (g) hereof there was a risk of contamination but, if such contamination had in fact occurred, it was not of such a nature as to be injurious to health."

Counsel for the corporation argues that we should read that as: in fact the contamination had not been injurious to anybody's health. However, that, as I have said, is not the question which the regulations pose, and in this particular context we are concerned with possibilities rather than with what has in fact happened. So the question is: Does this finding not rather mean that this contamination, if any, was not of the kind injurious to public health, but was innocuous contamination, if one may use that term? I think that is what the finding clearly does mean. When the justices talk of the nature of the contamination they are referring to the kind of contamination, and when they say it is not of such a nature, and so on, they are saying it is not of the kind injurious to public health. In other words, to say it was not of such a nature as to be injurious is to say more than that it has not hurt anybody; it is, in effect, to say that it could not hurt anybody.

Accordingly, on the construction which we are giving to reg. 8 and s. 13 of the Act of 1955, there was no risk of the kind of contamination referred to in reg. 8, and I agree that the appeal should be allowed. Of course, if a state of affairs should arise in any fish shop where customers were continually sneezing or coughing over the fish or continually handling it with dirty hands, a very different situation would arise, and nothing the court is saying today would preclude a conviction in such a case. This case, however, really turns on the construction of s. 13 of the Act of 1955 and on the particular finding of the justices which I have already quoted.

HAVERS, J.: I agree with the conclusions at which my brethren have arrived and with the reasons on which they base their decision.

Appeal allowed.

Solicitors: *Simpson, North Harley & Co.; Sharpe, Pritchard & Co., for C. Barratt, Coventry.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND HAVERS, JJ.)

October 18, 1957

R. v. METROPOLITAN POLICE COMMISSIONER. *Ex parte* MELIA

Magistrates—Warrant—Indorsement—Signed form pinned to warrant—Validity—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 12, as amended by Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), sched. V.

A magistrate, who was purporting to authorise the execution of a warrant within his jurisdiction signed a form of indorsement and the signed form was then pinned to the warrant.

HELD, that the magistrate did not "make an indorsement on the warrant signed with his name," as required by s. 12 of the Indictable Offences Act, 1948 (as amended), and that the purported indorsement was invalid.

APPLICATION for writ of habeas corpus.

On Aug. 16, 1957, the Dublin District Court, at the instance of the applicant's wife, issued a warrant for the arrest of the applicant. On Sept. 28, 1957, a metropolitan magistrate sitting at Clerkenwell signed a form of indorsement authorising the execution of the warrant within his jurisdiction pursuant to s. 12 of the Indictable Offences Act, 1848. The signed form was then pinned to the warrant, and on Sept. 30, 1957, the warrant was executed by the arrest of the applicant by the police within the magistrate's jurisdiction. On Oct. 2, 1957, the Divisional Court gave the applicant leave to move for a writ of habeas corpus and the applicant was released on bail.

Section 12 (as amended by the Magistrates' Court Act, 1952, s. 131 and sched. 5), provides that: "If any person against whom a warrant shall be issued in . . . Ireland, by any justice of the peace . . . shall . . . reside . . . in . . . England . . . it shall and may be lawful for any justice of the peace in and for the county or place . . . where [such person] shall reside or be . . . to make an indorsement on the warrant, signed with his name, authorising the execution of the warrant within the jurisdiction of the justice making the indorsement."

H. H. Harris for the applicant.

F. H. Lawton, Q.C., and *Stabb* for the Metropolitan Police Commissioner.

Gage for the complainant, the applicant's wife.

LORD GODDARD, C.J., delivered the following judgment of the court: In this case the warrant has not been indorsed in the manner required by the Indictable Offences Act, 1948, s. 12. It seems that a practice exists at Clerkenwell Magistrate's Court of having a form and pinning it to a document, but that is not an indorsement on the back of the document as required by law. Therefore, the applicant was illegally in custody, and accordingly we have no option but to discharge him.

Applicant discharged.

Solicitors: *J. Dalton*; Solicitor, Metropolitan Police; *Hempsons*.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND PEARSON, JJ.)

November 25, December 3, 1957

R. v. OLIVER

Criminal Law—Venue—Postponement of trial—Case sent to next assize but one in different county—Jurisdiction to make order—Criminal Justice Act, 1925 (14 & 15 Geo. 5, c. 86), s. 14 (2)—Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 & 2 Geo. 6, c. 63), s. 11 (3).

After the trial of a defendant had begun at Exeter assizes, and reports of the previous day's proceedings, which were prejudicial to the defendant, had appeared in newspapers, the judge, after discussion with counsel for the defendant, having discharged the jury, acted under s. 14 (2) of the Criminal Justice Act, 1925, and directed that the trial should take place at the winter assize for the county of Southampton (the next assize but one). On a motion by the Attorney-General under s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing trial at the next sessions of the Central Criminal Court beginning in December, 1957,

HELD, that the power conferred by s. 14 (2) of the Act of 1925 to direct trial at a court of assize for some other place was limited to directing trial at the next assize for that place, and, therefore, the order by the judge at Exeter assizes was made without jurisdiction, and the order directing change of venue as prayed for by the Attorney-General should be made.

PER CURIAM: Where removal to another court is sought on the ground of prejudice and there is any doubt with regard to a suitable court to which to send the case, it would be convenient to discharge the jury and order trial at the next assizes or sessions for the county or city where the indictment has been preferred, leaving it to the prosecution or defence to apply to the Queen's Bench Division for an order under s. 11 (3) of the Act of 1938.

MOTION by the Attorney-General for order directing change of venue.

On November 4, 1957, the trial of John Henry Walter Oliver for murder began at Exeter assizes before SALMON, J. In reports of counsel's opening speech in three national newspapers matters were included which counsel had deliberately refrained from mentioning, though they had been given in evidence and published in the local Press during the magisterial proceedings. Those matters had formed part of a statement which it was alleged the defendant had made to the police. The judge decided to discharge the jury in case any of them had seen those inaccurate reports which, in his opinion and that of counsel on both sides, were highly prejudicial. The judge, after discussion with counsel for the defence, also directed that the trial should take place away from Exeter, and that it should take place at the assizes for the county of Southampton, not at the forthcoming autumn assize, but, at the suggestion of counsel for the defence, at the winter assize, which would not be held until March, 1958.

The judge, in making the order which he did, relied on s. 14 (2) of the Criminal Justice Act, 1925, which provides: "Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or (if the offence is within the jurisdiction of a court of quarter sessions) before a court of quarter sessions, for some other place". The Attorney-General moved, under

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s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Fay, Q.C., and Michael Hoare for the Crown.

Skelhorn, Q.C., and H. E. Park for the respondent.

Cur. adv. vult.

Dec. 3. **LORD GODDARD, C.J.**, read this judgment of the court. On Nov. 4, 1957, the trial of John Henry Walter Oliver for murder began at the Exeter City Assize before SALMON, J. On the next morning counsel for the Crown called the attention of the learned judge to reports of the previous day's hearing which had appeared that morning in three national newspapers which circulated in Exeter. In the report of counsel's opening speech matters were included which in fact counsel had deliberately refrained from opening though they had been given in evidence and published in the local press during the magisterial proceedings. These matters had formed part of the statement which it was alleged the prisoner had made to the police, but in his discretion counsel had decided not to refer to them in opening and whether they would or would not have come out in the course of the trial is immaterial. When this was brought to his notice, the learned judge decided to discharge the jury in case any of them had seen these inaccurate reports, which in his opinion and in that of counsel for the Crown and defence were highly prejudicial. The learned judge also directed that in these circumstances the trial should take place away from the City of Exeter, and after discussion with counsel for the defence he directed that the trial should take place at the assizes for the county of Southampton, not at the forthcoming Autumn assize but at the Winter assize which will not be held till March next year. While no doubt counsel for the prosecution agreed that it was desirable that the case should be tried elsewhere than in Exeter, he took no part in the discussion as to where or when it should be tried but offered no opposition to the order which was made.

The Attorney-General now moves this court under s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, for an order directing the trial to take place at the next session of the Central Criminal Court. That sub-section is in these terms:

"If it appears to the High Court to be expedient in the interests of justice, the court may direct that an indictment or inquisition shall, instead of being tried at the court of assize or quarter sessions at which it would but for the direction be tried, be proceeded with and tried at such other court of assize, or, if the offence is within the jurisdiction of quarter sessions, at such other court of quarter sessions, as may be specified in the direction."

In making the order he did, the learned judge was relying on s. 14 (2) of the Criminal Justice Act, 1925, which reads as follows:

"Where for any reason whatsoever the trial of a person who has been committed to be tried for an indictable offence before a court of assize or quarter sessions for any place is either not proceeded with or not brought to a final conclusion before that court, it shall be lawful for that court, if in its discretion it thinks it convenient so to do with a view either to expediting the trial or re-trial or the saving of expense or otherwise and is satisfied that the accused will not thereby suffer hardship, to direct that the trial or re-trial of the accused shall take place before a court of assize, or

(if the offence is within the jurisdiction of a court of quarter sessions) before a court of quarter sessions, for some other place."

It is only right to say that it was at the suggestion of counsel for the defence that the learned judge ordered the case to go to the Winter assize. From the shorthand note it appears that counsel expressed doubt whether it would be possible for the case to be tried at the forthcoming Autumn assize, where there was already a heavy calendar, and before this court he contended that by that assize there would not be enough time for any prejudice to die down. This is not a ground which appeals to this court. We think it is almost fanciful to say that jurors in Hampshire would have been so interested in a trial for murder at Exeter that if they had read the reports in any of these papers they would remember the details so that they could not be trusted to try the case impartially. It is perhaps worth remembering what DENMAN, C.J., said as long ago as 1833 in *R. v. Holden* (1):

"When men are summoned into a jury box to decide upon a case of felony, such prejudice is very apt to die away: it is a kind of feeling which juries are learning more and more to lay aside; and we should rather relax that disposition by being too ready to suppose that they would be influenced by unjust impressions."

Moreover, according to the shorthand note the ground on which the learned judge was asked to send the case to the Winter assize was the possible difficulty of getting it tried at the Autumn assize owing to the pressure of business, but it is right that I should say that he did have in mind the possibility of prejudice still existing and he has also told us that he did not send the case to the Central Criminal Court partly because he thought that this was not looked on with favour and partly because he was not asked to do so.

This court is of opinion that it has power to entertain the application of the Attorney-General even if it was a matter within the learned judge's discretion, but if he had jurisdiction to make the order we should naturally be reluctant to interfere especially as it was supported by the defence and no objection was taken by the prosecution when it was made. As we have said, the learned judge relied on s. 14 (2) of the Criminal Justice Act, 1925, but the Attorney-General contends that that section must be read as giving power to the court to direct trial at some other place than that to which the accused was committed but only to the next assize for that place.

It must be remembered that this section made a considerable change in the law of venue and for the first time enabled a court of assize or quarter sessions to direct an indictment to be tried at a foreign court. For very many years statutory provision has been made for ensuring the prompt trials of persons charged with either felony or misdemeanour. Section 6 of the Habeas Corpus Act, 1679, contains stringent provisions to this end so that a prisoner not tried at the next sessions or gaol delivery may claim to be released on bail and if not tried at the following sessions may be discharged. Section 27 of the Criminal Procedure Act, 1851, provides that the court may on the application of a person indicted or otherwise postpone the trial to the next subsequent session to give him time for the preparation of his defence or otherwise. The Assizes Relief Act, 1889, s. 3, provides for the discharge of a prisoner where he is not tried at the next quarter sessions, and s. 14 (5) of the Criminal Justice Act, 1925, contained an express provision enabling the committal to be to the next quarter sessions but one and then only if the next sessions were to be held within five days of the date of committal and only if the accused were bailed. All these

(1) (1833), 5 B. & Ad. 347.

statutory provisions are, no doubt, for the protection of the accused and it may be contended that there is no reason why the direction should not be for trial to an assize subsequent to the next one if the accused consents. But the section gives a new power to the court and in our opinion that power is to commit to some other place and must be limited to the next assizes or sessions for that other place. We cannot think that Parliament intended to give so wide a power as is contended for in this case, especially in view of the provisions for ensuring trials at the next assizes or sessions to which we have referred. As the matter is one of jurisdiction, consent cannot enlarge the power. Moreover, if the argument to the contrary which was addressed to us were to prevail, it would follow that it would be left to the discretion of the court either at the instance of the prosecutor or the defence to direct the trial to take place at any subsequent assize to be held for the county to which the indictment is sent, provided it was satisfied that the accused would not suffer hardship, which might in most cases at least be avoided by granting bail, though the prosecution might be seriously hampered by the death or absence of witnesses. In our opinion, if this power of changing venue to a foreign court is exercised, the case must be committed to the next assizes or sessions, subject in the case of the latter to the provisions formerly in s. 14 (5) which would have been an unnecessary subsection if the court already had had that power under s. 14 (2).

We accordingly thought we ought to exercise our powers under s. 11 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, and have already directed the trial to take place at the next session of the Central Criminal Court, that is to say, the present session, which began yesterday. While we do not encourage frequent recourse to that court as a place of trial, as it is usually more than fully occupied with its own cases, charges of murder are generally regarded as an exception and ought to be tried as quickly as possible, and indeed before the Act of 1938 if a case had to be removed for trial on the ground of local prejudice it was to the Old Bailey that it had to go: see the Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), commonly called "Palmer's Act", repealed by the Act of 1938. We may say for future guidance that where removal is sought on the ground of prejudice and there is any doubt as to a suitable court to which to send it, it would be a convenient course for the court to discharge the jury and order a re-trial at the next assizes for the county or city where the indictment has been preferred, leaving it either to the prosecution or the defence to apply to this court for an order under s. 11 (3) of the Act of 1938 when it has been ascertained at what court the case can conveniently and expeditiously be disposed of.

At the end of the hearing and after we had announced our decision we were asked to direct that no report of these proceedings should appear in the Press, and we were referred to *R. v. Clement* (1) as an authority enabling the court to give such a direction. That was a case in which several persons were to be tried separately in respect of the same offence, and the court did direct that no report of any one case should appear until all were tried. We do not think it necessary to decide whether that case would enable us to forbid the publication of such proceedings as these because we are satisfied that no possible prejudice can be caused to the accused man, as no reference was made to the articles to which exception was taken during the hearing.

Order accordingly.

Solicitors: *Director of Public Prosecutions; Theodore Goddard & Co., for Crosse & Crosse, Exeter.*

T.R.F.B.

(1) (1821), 4 B. & Ald. 218.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., GORMAN AND PEARSON, JJ.)

November 11, 1957

R. v. SOLOMON

Criminal Law—Trial—Jury—All jurors summoned released—Praying of tales by clerk of the peace—Jury composed entirely of talesmen—Irregularity necessitating new trial.

When the applicant appeared to take his trial at a borough quarter sessions it was found that the panel of jurors who had been summoned the previous day had, owing to a misunderstanding, been released. The clerk of the peace purported to pray a tales de circumstantibus by securing the attendance of twelve persons whom he fetched from a neighbouring building to form a jury to try the case. Counsel for the defence raised no objection to the procedure.

HELD: Section 37 of the Juries Act, 1825, being inapplicable to quarter sessions, the common law applied; there could not be a jury composed entirely of talesmen; and, therefore, there had been a mistrial, and the court would order a venire de novo directing that the appellant be re-arrested and tried at the next quarter sessions of the borough.

PER CURIAM: Where there is a complete shortage of jurors named in the panel and it is desired that the trial should proceed on the same day, the proper course is to require the sheriff to return a further panel of jurors instant.

APPEAL against conviction.

The appellant, Donald James Solomon, appealed against his conviction for larceny at Brighton Borough Quarter Sessions on June 21, 1957, on the ground that the jury who tried him were improperly summoned and that the trial was therefore a nullity.

On June 21, when the appellant's case came on for trial, all the jurors summoned at the Brighton Borough Quarter Sessions had been inadvertently released, and the clerk of the peace therefore proceeded to pray a tales de circumstantibus in that he secured the attendance of twelve jurors at random from persons, apparently suitable, who were working in an office near the court. No formal written order to pray a tales was signed by the court, nor was an order pronounced in open court. Before the trial proceeded, the clerk of the peace stated that it was believed that the members of the jury were qualified and liable to act as jurors, but he drew the attention of counsel for the appellant to the fact that the jury had been summoned in haste, and that the right of challenge existed. Counsel for the appellant stated that he had no objection to the jury as a whole, and the trial then continued.

Subsequent investigation showed that eight of the jurors were included in the register of electors, but that only two of those had the letter "J" (which indicated that they were qualified to serve as jurors) beside their names. One other juror lived in Brighton, but in a new road and was not therefore in the register of electors, and the three remaining jurors lived outside the Borough of Brighton but within the County of Sussex.

Section 37 of the Juries Act, 1825, provides: "Where a full jury shall not appear before any court of assize . . . or before any of the superior civil courts of the three counties palatine, or before any court of great sessions . . . every such court, upon request made for the King . . . or on request made by the parties . . . shall command the sheriff or other minister to whom the making of the return shall belong to name and appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury . . .".

E. Clarke for the appellant.

Pensotti for the Crown.

LORD GODDARD, C.J., having stated the facts regarding the summoning of the jury, and having further stated that in this case it was unnecessary to consider whether the jurors should possess the qualification of living in the borough of Brighton, continued: The appellant, having been convicted and given an extraordinarily lenient sentence—only a fine and some costs—has now taken the point that the jury by which he was convicted was no jury at all, an improper jury, and that, therefore, the trial was a nullity. This brings up the question of how a tales can be properly prayed and what are the necessities before talesmen can be empanelled as jurors. The law with regard to talesmen is very obscure and may be said to be particularly obscure with regard to proceedings at quarter sessions because s. 37 of the Juries Act, 1825, which deals with tales de circumstantibus, does not apply in terms to quarter sessions. It applies to courts of assize, any of the superior civil courts of the three counties palatine, that is Durham, Lancaster and Chester, "or . . . any court of great sessions". That is the Court of Great Sessions of Wales, which had existed since the reign of Henry VIII, but it was not a quarter sessions of the peace, which is an entirely English court and not a court of great sessions. Therefore, if tales are prayed at any rate at borough quarter sessions and, I think, county quarter sessions, the common law must prevail, and, as I say, the common law seems to be somewhat obscure on the subject.

We have been referred to passages at *HALE*, vol. II, 265; *BLACKSTONE* (16th ed.) 4 Comm, 354; *HAWKINS' PLEAS OF THE CROWN* (8th ed.) vol. II, 565, 566, ss. 17, 19. One thing does emerge as certain, and it is that there cannot be a complete jury of talesmen: it is on this that we propose to base our judgment. The procedure for providing juries for quarter sessions is this. Two justices of the peace at least send their precept to the sheriff to summon jurors, just as judges who are going on assize send their precept to the sheriff, and the sheriff acting in accordance with the precept must prepare panels. He summons jurors, and he returns the panel to the judge or the clerk of the peace of quarter sessions. It will be known by members of the Bar that at the assizes the crier addresses the sheriff and calls on him "to return the several writs and precepts that my lords the Queen's justices may proceed thereon", and what the sheriff then hands to the judge is the jury panel. Those are the jurors whom he has summoned. If there is a defect in the jury, that is to say, if a full jury cannot be empanelled from the names on the panel, a tales can be prayed. Whether the talesmen must be actually present in the precincts of the court or can be brought in from the street, we need not inquire because we do not want to give a decision on any point that is immaterial. It seems to the court, however, that one cannot have a jury composed entirely of talesmen because the very fact that it is a tales implies that there must be a quales. Since writs of error were abolished, records are not drawn up, but if the record had been drawn up it would have been necessary to set out in it the jury panel, and the names of the jurors who actually were empanelled to try the issue. If there were no jurors who were in the original panel, it would have been plain on the record that twelve people, who had not been summoned, had tried the prisoner, and if a tales is to be summoned there must be, as it seems to the court, a jury composed partly of those who have been summoned, the quales, and added to them, if the record had been drawn up, such persons standing by as would make up the full jury. In this case all the persons who tried the case had never been summoned. If there is a complete defect or shortage of jurors, as happened in this case, the court desires to say that in their opinion the proper course is to require the sheriff to return a further panel instantan. It may be that at borough quarter sessions

it would be impracticable. We have not considered that question, but, I think, the clerk of the peace summons the jurors; at any rate, if this happens again and the trial is to proceed on the same day, it seems to us that the right course, instead of praying tales, is to require a fresh panel to be empanelled instant.

We feel bound to say that the people who tried this case were unqualified. There was no qualified person among them. There cannot be a tales without a quales. Therefore, it is as if the trial had taken place before no jury at all. No objection was taken at the trial and the appellant and his counsel had knowledge of what had taken place, but it does not follow that this court, on a ground such as that of waiver, cannot or ought not to give effect to the present objection, because, so it seems to the court, there was no jury at all. We feel bound, therefore, with great reluctance to say that we must set aside the verdict and judgment that were given in this case. We shall certainly order a venire de novo to issue, that is to say, we shall order a warrant to be issued for the arrest of the appellant, who can therefore be taken before justices and bailed to appear again at the next sessions because venire de novo is an order for the appellant to be tried over again. The court will therefore give directions to the Master of the Crown Office that a warrant must be issued for his arrest and the justices can proceed to bail him, and he can be tried at the next quarter sessions.

[Counsel for the appellant then addressed the court on its directions that a warrant be issued, and that the appellant be tried at the next Brighton Quarter Sessions. He submitted that, on the authority of the order made in *R. v. Cronin*, (1), it was unnecessary to direct the issue of a warrant, and that the court (which had the same powers as a court of quarter sessions) had power to order the appellant to be tried at East Sussex Quarter Sessions in view of the publicity concerning the first trial at Brighton Quarter Sessions and this appeal. In the circumstances of the case, however, the court ordered that a warrant for the appellant's arrest be issued, so that he should be brought before justices for them to consider whether he should be allowed bail. The court doubted whether it had jurisdiction to order trial at East Sussex Quarter Sessions. The appellant could, however, apply to the Queen's Bench Division under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 11 (3), for such an order.]

Appeal allowed: order for a venire de novo.

Solicitors: *Hempsons*; Town Clerk, Brighton.

T.R.F.B.

(1) 104 J.P. 216; [1940] 1 All E.R. 618.

COURT OF APPEAL

(JENKINS, PARKER AND PEARCE, L.JJ.)

FRANCIS v. YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL

November 11, 12, 1957

Town and Country Planning—Enforcement notice—Notice complaining that development carried out without permission—Temporary permission in fact given by Minister after development carried out—Use continued after expiry of temporary permission—No appeal to justices against notice—Validity of notice—Right to question validity in High Court—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 23 (1) (4).

On February 1, 1949, an occupier of land within the area of the defendant local authority began to use the land as a caravan site, and thus carried out a "development" of the land within the meaning of the Town and Country Planning Act, 1947. By virtue of art. 3 (1) and sch. I, class iv (i), of the Town and Country Planning (General Development) Orders, 1948 and 1950, no permission was or is required for such use for a period not exceeding 28 days in any one year. The occupier, however, continued this use, and on March 1, 1949, applied to the local authority (to which the relevant powers of the local planning authority had been delegated) for the necessary planning permission, which the local authority refused. On February 22, 1950, the Minister, on an appeal by the occupier, "decided to allow the appeal to the extent that he permits the use under appeal for a period of six months from the date of" his decision. The occupier continued the use for more than the six months, and on July 23, 1952, the local authority served him with an enforcement notice under s. 23 of the Act, alleging that the "development . . . was carried out without the grant of planning permission required under Part III" of the Act and requiring him within 28 days of the service of the notice "to remove all caravans from the site." The occupier did not exercise the right to appeal against the notice to a magistrates' court given him by s. 23 (4) of the Act, but continued to use the land as a caravan site. The local authority took no steps under s. 24 (3) of the Act to prosecute the occupier, who, on December 29, 1955, brought an action in the High Court for a declaration that the enforcement notice was invalid.

HELD: the occupier was entitled to the declaration because

(i) although the notice did sufficiently "specify the development which is alleged to have been carried out without the grant of permission" to comply with s. 23 (1) of the Act, it was invalid because it proceeded on a wholly false basis of fact in that it stated that the development had been carried out without permission whereas in fact, the Minister had granted permission, albeit subsequently to the carrying out of the development and then only for six months; and, therefore, the notice was not a proper notice setting out the real grounds of the complaint or claim against the occupier to which he was entitled.

East Riding County Council v. Park Estate (Bridlington), Ltd. (1956), 120 J.P. 380 applied.

(ii) the occupier's failure to appeal against the enforcement notice did not preclude him from maintaining his claim for the declaration that that notice was invalid.

Perrins v. Perrins (1951), 115 J.P. 346 overruled.

APPEAL by the defendants, Yiewsley and West Drayton Urban District Council, to whom the relevant powers of the local planning authority had been delegated by the Middlesex County Council, against an order of McNAIR, J., reported (1957), 121 J.P. 276; declaring that an enforcement notice under the Town and Country Planning Act, 1947, s. 23, served by the defendants on the plaintiff, Kenneth John Roy Francis, the occupier of certain land within the area of the authority, requiring him to discontinue the use of his land as a caravan site, was invalid.

Widgery for the local authority, the defendants.

Frank for the plaintiff.

JENKINS, L.J.: This is an appeal by the defendants, Yiewsley and West Drayton Urban District Council, from a judgment of McNAIR, J., whereby he granted to the plaintiff, Mr. Francis, a declaration to the effect that an enforcement notice served on him by the defendants, in pursuance or purported pursuance of the provisions of the Town and Country Planning Act, 1947, was invalid.

The facts are short, and are not in dispute; but before I refer to them, it will be convenient to notice some of the provisions of the Act of 1947. One can begin with s. 12 which provides:

"(1) Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.

"(2) In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land: . . ."

The last words "or the making of any material change in the use of any buildings or other land" are the material words for the purpose of the present case. Section 13 (1) of the Act of 1947 provides:

"The Minister shall by order provide for the grant of permission for the development of land under this Part of this Act, and such permission may be granted—(a) in the case of any development specified in any such order, or in the case of development of any class so specified, by that order itself; . . ."

I think that I do not need to read any more of that section. Section 14 provides by sub-ss. (1), (2):

"(1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations.

"(2) Without prejudice to the generality of the foregoing sub-section, conditions may be imposed on the grant of permission to develop land thereunder— . . . (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified period, and the carrying out of any works required for the re-instatement of land at the expiration of that period; and any permission granted subject to any such condition as is mentioned in para. (b) of this sub-section is in this Act referred to as permission granted for a limited period only."

Section 15 provides by sub-ss. (1), (2):

"(1) The Minister may give directions to any local planning authority, or to local planning authorities generally, requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Minister instead of being dealt with by the local planning authority, and any such application shall be so referred accordingly.

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"(2) Where an application for permission to develop land is referred to the Minister under this section, the provisions of sub-ss. (1) and (2) of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of the application by the Minister as they apply in relation to the determination of such an application by the local planning authority: . . ."

Section 16 of the Town and Country Planning Act, 1947, contains provisions for appeals to the Minister and provides by sub-s. (1):

"Where application is made under this Part of this Act to a local planning authority for permission to develop land, or for any approval of that authority required under a development order, and that permission or approval is refused by that authority, or is granted by them subject to conditions, then if the applicant is aggrieved by their decision he may by notice served within the time, not being less than twenty-eight days from the receipt of notification of their decision, and in the manner prescribed by the development order, appeal to the Minister . . ."

Then there is a proviso which I can omit, and s. 16 (2) provides:

"Where an appeal is brought under this section from a decision of the local planning authority the Minister may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance; and the provisions of the last foregoing section shall apply, subject to any necessary modifications, in relation to the determination of an application by the Minister on appeal under this section as they apply in relation to the determination by the Minister of an application referred to him under that section."

I should also refer to s. 18 which provides by sub-ss. (1), (2):

"(1) The power to grant permission to develop land under this Part of this Act shall include power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application, or for the continuance of any use of land instituted before that date (whether without permission granted under this Part of this Act or in accordance with permission so granted for a limited period only); and references in this Part of this Act to permission to develop land or to carry out any development of land, and to applications for such permission, shall be construed accordingly.

"(2) Any such permission as is mentioned in the foregoing sub-section may be granted so as to take effect from the date on which the buildings or works were constructed or carried out, or the use was instituted, or from the expiration of the said period, as the case may be."

I can next go to s. 23 which deals with the enforcement of planning control, and contains the provisions as to enforcement notices with which we are immediately concerned. Section 23 provides:

"(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out . . . if they consider it expedient

so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

"(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.

"(3) Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein:

"Provided that—(a) if within the period aforesaid an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land . . . [a certain time is allowed during which the notice is of no effect]; (b) if within the period aforesaid an appeal is made to the court under the following provisions of this section by a person on whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal.

"(4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal: . . .

"(5) Any person aggrieved by a decision of a court of summary jurisdiction under the last foregoing sub-section may appeal against that decision to a court of quarter sessions."

There are certain supplementary provisions as to enforcement. Section 24 (1) and s. 24 (3) provide:

"(1) If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner

of the land any expenses reasonably incurred by them in that behalf; and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal.

"(3) Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued."

Then I should note that by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, art. 3, permission is in effect granted, under the provisions of s. 13 of the Act, for certain types of development specified in Sch. 1 to the order; and one of these permitted types of development is thus stated in para. 2 of Class IV of Sch. 1:

"The use of land (other than a building or the curtilage of a building or the site or curtilage of a building which has been demolished in consequence of war damage) for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use."

Those, I think, are the relevant statutory provisions, and I now turn to the facts. The plaintiff ("the occupier") occupies land at West Drayton, within the defendants' (the authority's) district. On or about Feb. 1, 1949, the occupier began to use the land as a caravan site, and a number of caravans were brought on the land and kept there. The occupier did not obtain any permission under the Town and Country Planning Act, 1947, to make this change of use which, in the view of the authority, was a material change of use, and as such amounted to development within the meaning of s. 12 (2) of the Act. The occupier was alive to this, and it seems that on Mar. 1, 1949, he applied to the authority for planning permission. The period between the bringing of the caravans on the land on or about Feb. 1, 1949, and the application for permission on Mar. 1, 1949, approximates to the period of twenty-eight days allowed under the provisions of the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958, art 3, sched I, Class IV).

On May 10, 1949, the authority refused the permission sought by the occupier, and the occupier appealed to the Minister. The Minister in due course directed a public inquiry; and ultimately on Feb. 22, 1950, he announced his decision thus in a letter addressed to the clerk to the authority:

"Sir, Town and Country Planning Act, 1947. I am directed by the Minister of Town and Country Planning to state that he has considered the report of his inspector, Mr. K. Cummings, A.R.I.B.A., following the local inquiry into the appeal by Mr. K. J. R. Francis against the refusal of your council, acting on behalf of the local planning authority, to permit

the use, as a caravan site, of land situated at Thorney Lane, West Drayton, and shown on the submitted plan.

"The Minister has considered the facts and representations before him. The site forms part of an open belt of country, recommended in the Greater London Plan for preservation as open space, and the Minister understands that it is the intention of the council to acquire the site for use as a public open space. In these circumstances, and having regard to the situation of the site in full view from the adjoining Class B road and to the likelihood of drainage difficulties on this low-lying riverside land, the Minister feels no doubt that the decision of the council was justified.

"He notes, however, that there are at present some sixteen occupied caravans on the site, and he is of opinion that the occupants of these caravans should be given reasonable time in which to find alternative sites or accommodation. For this reason alone, he has decided to allow the appeal to the extent that he permits the use under appeal for a period of six months from the date of this letter, which is issued by the Minister as his formal decision."

Then there is a reference to bye-laws and other enactments with which I need not trouble, and the letter is signed by a person stated to be authorised by the Minister to sign in that behalf.

The occupier in fact continued his user of the land up to, during and after the six months' permission granted by the Minister, and as matters then stood it appears that the authority were not anxious to insist on the occupier's compliance, owing to the difficulty of finding other accommodation for the people residing in the caravans. There seems to have been some correspondence between the parties, but the next matter of any materiality was the service by the authority on the occupier of the enforcement notice to which the action relates. That notice is dated July 23, 1952, and was served on or about the same day, and I should read it in full. Omitting the heading it runs as follows:

"Whereas you are the owner and/or occupier of land situate at south of and fronting Thorney Mill Road, West Drayton, and bounded on the east and south by the River Colne, and known as 'Riverside' And whereas on or about Feb. 1, 1949 the land above described was developed by placing thereon caravans for residential purposes. And whereas such development before-mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947. Now therefore the Urban District Council of Yiewsley and West Drayton on behalf of the County Council of the Administrative County of Middlesex as local planning authority in exercise of the powers contained in s. 23 and s. 24 of the said Act of 1947 Hereby give you notice to remove all caravans from the site within fifty-five days of the date on which this notice takes effect. This notice shall subject to the provisions of s. 23 of the said Act take effect on the expiration of twenty-eight days after the service thereof upon you."

On receipt of that notice, the occupier did not appeal. He did apparently make a further application for permission to use the land as a caravan site, but that met with refusal. The authority on their part took no action by way of prosecuting the occupier for his non-compliance with the enforcement notice. Finally the writ in this action was issued by the occupier on Dec. 29, 1955. The importance of the matter to the authority is that, as will have been observed, under s. 23 (1) of the Act the right for a local planning authority to serve an enforcement notice is limited to the period of four years from the date of the relevant development. If, therefore, the notice served on July 23, 1952, is held invalid,

the result to the authority will be that they will be out of time, the four year period having passed, and so will not be able to regularise the matter by the simple expedient of starting again with a fresh enforcement notice.

The points taken before the learned judge and argued in this court are substantially these. First, it is said that the notice was bad because it did not sufficiently specify the development alleged to have been carried out, or say whether it was in respect of development without permission, or was in respect of breach of conditions. In presenting that argument before us, counsel for the occupier concentrated on the objection that the development was not sufficiently specified. He pointed out that any enforcement notice served must, by s. 23 (2), specify the development which is alleged to have been carried out; and he said that this requirement is not sufficiently complied with by the recitals in the enforcement notice in the present case:

"whereas on or about Feb. 1, 1949 the land above described was developed by placing thereon caravans for residential purposes. And whereas such development before-mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947."

Counsel for the occupier contends that notwithstanding the express reference to the placing on the land of caravans for residential purposes, even though that is described in terms as a development—the allegation being that "the land above described was developed by placing thereon caravans for residential purposes"—nevertheless the development is not sufficiently specified because the owner of the land is not told what material changes of user are alleged. He says further that the mere placing of caravans on land does not amount to a development; it may depend on a variety of matters, including the presence or absence of caravans on the land before the date of the alleged development.

I cannot accept this branch of the argument of counsel for the occupier. It is no doubt true that notices which may have penal results, and which are served pursuant to legislation which has the effect of curtailing ordinary proprietary rights, should be strictly construed, and the court should be careful to see that they are adequate documents having regard to the terms of the legislation. To my mind, however, this criticism of the present notice goes too far. It seems to me to be reasonably plain that it tells the owner that something has happened on his land which the authority allege to be a development, namely, the placing thereon of caravans for residential purposes. I think that by including in their notice recitals to that effect the authority sufficiently complied with the requirement in s. 23 (2) that the notice should specify the development. Accordingly I reject that ground.

The second ground, which was the one on which the learned judge decided in the occupier's favour—having, as I have done, rejected the first argument—affords to my mind a far more formidable objection. At the date of the enforcement notice, the position was this. The development had taken place in February, 1949. No prior permission had been obtained; but on the other hand for the first twenty-eight days of this user no permission was required over and above the permission given by the General Development Order. From the expiration of that period of twenty-eight days there was no further permission in respect of the development until the Minister's decision; and the Minister had, by his decision on Feb. 22, 1950, allowed the occupier's appeal to the extent that he permitted the use under appeal for a period of six months from the date of his letter; and the period of six months during which that permission endured had

expired on Aug. 22, 1950. Those were the surrounding circumstances in the light of which the validity of this notice must be considered.

I return again to s. 23 (1):

"If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

then the notice may be served within four years. In the circumstances that I have stated, could it appear to the authority that the development in the present case had been carried out after the appointed day without the grant of permission required in that behalf under the Act? Counsel for the authority says that this question should be answered in the affirmative, and as I understand it, he puts his argument thus. He says that this placing of caravans on the land was a development carried out after the appointed day. He says moreover that it was carried out without the grant of permission required under the Act, inasmuch as no prior permission was obtained. Therefore the enforcement notice was perfectly right in reciting that the development in question was carried out without the grant of planning permission; and the defendants could properly so state in their notice, thus complying with s. 23 (1). So counsel for the authority in that way arrives at the conclusion that the notice is good, and complies with the terms of the section, when considered in the light of the facts, simply as a notice dealing with a case in which there has been a development in respect of which no permission at all has been given. As to the Minister's direction, counsel for the authority in effect said that the permission granted by the Minister (granted as it was only for the limited period of six months) was spent long before this notice was served. It was thus no longer relevant, and could be disregarded, though no doubt it would have been open to the authority, if so minded, to frame the notice as given in respect of a breach of a condition imposed by the Minister's permission to the effect that the use was to be discontinued at the end of the six months from Feb. 22, 1950. I cannot accept this argument.

Counsel for the occupier puts the matter in a way which he complicates somewhat by the introduction of the permission under the General Development Order, (S.I. 1948, No. 958, replaced May 22, 1950, by the similar provisions of S.I. 1950, No. 728), in respect of twenty-eight days in any calendar year for certain types of development, such as the caravans in this case. He says that it is wholly wrong and untrue to say that the development here in question was carried out after the appointed day without the grant of permission. He says that there was permission in two respects, or at two stages: first, there was the statutory permission to use the land for such purposes for twenty-eight days. Secondly, when that twenty-eight days ran out, albeit there was an interval when there was no permission in force, permission was ultimately granted by the Minister to continue the user for six months from Feb. 22, 1950, so that there had in fact been permission, and to state otherwise was to state an untruth.

I do not propose to examine the mysteries of the General Development Order or the precise quality of the twenty-eight days in any calendar year for which user is allowed without permission other than the permission granted by the order itself. I am content to deal with the matter simply by reference to the permission granted by the Minister. The words of s. 23 (1) refer to the grant of permission required in that behalf under the Act; and, in my judgment, that reference to permission must include (as indeed s. 18 indicates) permission given

after the development has been carried out; and if one construes the reference to permission in s. 23 (1) in that way, it is clear that it could not be said of this development that it was carried out after the appointed day without the grant of permission. Permission was granted, albeit not prior permission, but permission subsequent to the carrying out of the development. That being, however, in the view I take, permission within the meaning of the Act, it necessarily follows that there is a misstatement in the recitals of the enforcement notice. That, I think, is all that I need say on this second point. It is a very short one when reached, although the reaching of it involves consideration of several sections of the Act. It follows from what I have said that the notice proceeded (as the learned judge said in effect) on a wholly false basis of fact; and inasmuch as it proceeded on a wholly false basis and, so to speak, charged the occupier with an offence other than the offence which he had actually committed, it cannot stand. An owner of land whose rights are to be affected by the service of a notice of this sort is, in my opinion, entitled to a proper notice setting out the real grounds of the complaint or claim against him, whatever it may be. I think that that view is borne out by the speeches in the House of Lords in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1).

Finally, the point was taken that, however strong the occupier's case might be on the merits, this action could not be maintained owing to the provisions of ss. 23 and 24 of the Town and Country Planning Act, 1947. It will be remembered that s. 23 (3) provides:

"Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein."

It will further be remembered that there was no appeal by the occupier against the enforcement notice in exercise of the right of appeal conferred by s. 23 (4). It was said that the occupier, having failed to avail himself on his right of appeal, could not now litigate the matter before the learned judge or in this court. The time for appeal having run out, the provision in the Act that the enforcement notice shall take effect, according to this view, concludes the matter. That is a view which I cannot accept. Whatever the result might be of an unqualified provision that after a certain time an enforcement notice should take effect, s. 24 (1) contains an express provision limiting to a qualified extent the right of the party aggrieved to litigate the matter. That limitation is expressed in these words:

"and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal."

That is quite inconsistent with any general bar, and it should be noted that it is limited to "proceedings under this sub-section". "This sub-section", namely, s. 24 (1), deals with development other than development by material change in user, and it contains provisions under which the local planning authority may enter on the land, and in effect take the necessary steps to put an end to the development in question, and, having taken those steps, may recover as a simple contract debt in any court of competent jurisdiction from the person who is then

(1) (1956), 120 J.P. 380; [1956] 2 All E.R. 669; [1957] A.C. 223.

the owner of the land any expenses reasonably incurred by them in that behalf. The relevant provision in this case, however, is not s. 24 (1), but s. 24 (3). That provides for the prosecution and punishment by fine of persons who fail to carry out an enforcement notice in cases in which, by virtue of an enforcement notice, any use of land is required to be discontinued. That sub-section contains no limitation at all on the arguments that the person prosecuted can put forward, whether or not they are arguments which he might have taken on an appeal. In these circumstances, I cannot accept the view that the occupier is barred from the remedy that he seeks by way of declaration.

I appreciate that that view is in conflict with the decision in *Perrins v. Perrins* (1). In that case (which was also a case of change of user) the defendants, who had been served with an enforcement notice requiring them to discontinue the use of the land in question as a camping site, took none of the steps required in the notice, and lodged no appeal against it. They were charged under s. 24 (3) of the Act with using the land in contravention of the notice. The justices acquitted them of that offence on the ground that the land in question had been used as a camping site before and on the appointed day, and that the prosecutor had, therefore, not proved that there had been any development as alleged in the notice. On the prosecutor's appeal it was held that, whether the planning authority were right or wrong in the view which they took of the development of the land, the effect of s. 23 (3) 9f the Act of 1947 was that an enforcement notice which was not appealed within twenty-eight days became effective, and that the justices could not then question its validity. Having regard to the views that I have endeavoured to express as to the construction of ss. 23 and 24 of the Act, I cannot agree with that conclusion. The learned judge found it possible, while accepting the decision in *Perrins v. Perrins* (1)—a case which was binding on him—to reach the same conclusion as I have with respect to the admissibility of the present claim for a declaration. I say nothing further about that aspect of his judgment because it seems to me that the simple answer is that *Perrins v. Perrins* (1) was wrongly decided.

I have now dealt with the essential points in the case, and for the reasons I have endeavoured to state I hold that this appeal fails, and should be dismissed.

PARKER, L.J.: I have come to the same conclusion, and I will add only a few words in deference to counsel for the authority's argument on what I may call the second point, namely, as to the factual basis of the enforcement notice. Under s. 23 (1) of the Town and Country Planning Act, 1947, it is clear that there are two alternative conditions precedent to the service of an enforcement notice. It must either appear

"to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act",

or it must appear to the local planning authority

"that any conditions subject to which such permission was granted in respect of any development have not been complied with . . ."

Here it is to my mind clear that there has been a breach of condition. The Minister by his decision of Feb. 22, 1950, has permitted the user of this land as a caravan site for a period of six months. It is said (and said with some force) that no express condition is therein set out that at the end of the six months' period the caravans are to be removed. As I read it, however, such a condition

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must be implied. For one reason, it seems to me that the Minister had otherwise no power to give any such permission. Under the relevant section (s. 16), which gives the Minister his powers on appeal, his powers are those which he would have had under s. 15 if he had, as it were, called in the case and dealt with it himself from the beginning; and his powers under s. 15 carry one back to s. 14, and set out the powers of the local planning authority, which are either to grant the permission, or to refuse the permission, or to grant permission subject to condition. Those were the only powers of the Minister.

Indeed, as I understand it, counsel for the authority is really forced to concede that this decision of the Minister should properly be regarded as a conditional permission. He did suggest that it might be read as a direction under s. 23 which empowers the Minister to give directions to a local planning authority not to serve a notice. If, however, that were the object and intention, the Minister could not have allowed the appeal. Counsel for the authority is accordingly forced to say that in this case he had a choice as to which of the conditions precedent to which I have referred he should allege. He says that he could have proceeded under either. At first sight that would be a surprising conclusion if it were true, because it seems impossible to allege that a person has broken a condition, and at the same time be able to say that no permission was ever granted. The answer, however, is that on the facts of this case the authority cannot bring themselves within the first condition precedent, which is the only condition they have alleged. As my Lord has said, the words "without the grant of permission required in that behalf" must be read as including permissions whether given before or after the development in question; and that is made clear by s. 18, to which he has referred, which specifically includes a power in the Minister to make a decision retrospective. Accordingly, in my view, the factual basis that has been referred to in this notice is false.

I should add that I desire to make no comments as to the so called permission, given by the development order itself, for user on twenty-eight days, and as to the effect of that permission.

Lastly, in regard to *Perrins v. Perrins* (1), like my Lord I feel constrained to say that that case was wrongly decided; and I am less diffident in doing so because another Divisional Court in *Norris v. Edmonton Corpn.* (2) clearly had in mind some doubt. LORD GODDARD, C.J., himself—who, of course, had sat in the first court—said:

"As this is a criminal cause or matter (the appellant being summoned on an information and dealt with for a default) it is a great misfortune, I think, that this case cannot go to the House of Lords. There are still obscure questions under this section, and now that I have called attention prominently to *Keats v. London County Council* (3) it is very desirable that an opportunity should be given to their Lordships to consider that case. Unfortunately, the law does not allow an appeal from this court in a criminal cause or matter, but I hope that possibly some opportunity may be taken to try to clear up by legislation the obscure position which arises under this Act."

SLADE, J., said:

"I respectfully agree with my Lord that this court is bound by its decision in *Perrins v. Perrins* (1). Had the matter been *res integra* I should have required to hear argument on the true construction of s. 24 (1) and (3)".

(1) 115 J.P. 346; [1951] 1 All E.R. 1075; [1951] 2 K.B. 414.

(2) [1957] 2 All E.R. 801.

(3) 118 J.P. 548; [1954] 3 All E.R. 303.

and the learned judge went on to refer to s. 24 (1) where the bar is expressed as one in proceedings "under this sub-section".

For the rest I entirely agree with what my Lord has said, and for these reasons I would dismiss this appeal.

PEARCE, L.J.: I agree with what my Lords have said. I would only add this in regard to s. 24 of the Town and Country Planning Act, 1947, since we are differing from the view expressed in *Perrins v. Perrins* (1). The insertion of the words in question in s. 24 (1) and their omission from sub-s. (3) indicate a deliberate intention to create a difference in that respect between the two sub-sections. Further, those words are suitable in sub-s. (1), but are not apt for transplantation into sub-s. (3). Moreover, the probabilities indorse this view. It would seem reasonable to create an estoppel in cases where the authority has done work on the basis of the unchallenged validity of the notice, and is seeking to recover the costs as a debt. In such a case the court hearing comes at a stage that is inconveniently late for questioning the validity of the notice. In cases, however, where the authority are prosecuting an owner or occupier for continuing some unpermitted use, there seems less necessity for preventing an investigation of the question whether the notice was a good one; and it may well have been thought undesirable to deprive a defendant of what might be a valid defence against conviction.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for Clerk to Yiewsley and West Drayton U.D.C.; *Speechly, Mumford & Craig*, for Woodbridge & Sons, Uxbridge.

H.S.

(1) 115 J.P. 346; [1951] 1 All E.R. 1075; [1951] 2 K.B. 414.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND STEVENSON, J.)

November 6, 7, 1957

NEWMAN v. NEWMAN

Husband and Wife—Maintenance order—Discharge—Adultery—"Fresh" evidence—Husband unaware of wife's adultery at date of order—Lapse of time for appeal—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7.

Where a husband against whom an order has been made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discovers after the time for appeal has elapsed that the wife had committed adultery before the date of the order, he can apply to the justices under s. 7 of the Act of 1895 to discharge the order on the ground that the adultery constitutes "fresh evidence".

SEMPLE: he can also apply to the Divisional Court for leave to appeal out of time against the order.

APPEAL against an order of Worthing justices whereby they refused to discharge an order made in the wife's favour on Dec. 15, 1952.

The parties were married in 1933 and there were two children born in 1934 and 1940 respectively. The husband was in the army from 1939 until he was demobilised in October, 1952. On that date the husband did not return to the matrimonial home. The wife then caused a summons to be issued against him on her complaint that he had wilfully neglected to provide reasonable maintenance for her and the younger child. On Dec. 15, 1952, the Worthing justices

found the complaint proved, granted the custody of the child to the wife and ordered the husband to pay to the wife the sum of £2 a week as maintenance for her and 10s. a week as maintenance for the child. In February, 1956, the wife presented a petition for divorce on the ground of the husband's desertion, and prayed for the exercise of the court's discretion in respect of her own adultery. By his answer the husband denied desertion and cross-prayed for divorce on the ground of the wife's constructive desertion and adultery. The charge of adultery was based on an alleged admission by the wife. On Aug. 14, 1956, the wife filed her discretion statement. The suit came before Mr. Commissioner GALLOP, Q.C., on Feb. 22, 1957. The wife's discretion statement was put in evidence and disclosed that she had committed adultery on several occasions from September to December, 1942. The adultery charged by the husband in his answer was different from that admitted by the wife in her discretion statement. At the conclusion of the evidence the commissioner found that the husband had deserted the wife, dismissed the husband's charges of constructive desertion and adultery (having refused leave to amend the answer by adding a charge of adultery based on the facts disclosed in the wife's discretion statement) and granted the wife a decree nisi in the exercise of the court's discretion. By complaint dated Apr. 26, 1957, the husband applied to the Worthing justices to discharge the order of Dec. 15, 1952, on the ground that the wife's adultery in 1942 constituted "fresh evidence" within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. At the hearing before the justices on June 21, 1957, it was conceded on behalf of the wife that at the date of the order, i.e., Dec. 15, 1952, the husband did not know and could not by reasonable means have obtained knowledge of the wife's adultery in 1942, but it was contended that the justices should dismiss the husband's complaint in view of his own conduct. The justices dismissed the husband's complaint. They stated as their reasons:

"(i) The court was not satisfied that the husband had established that he was unaware of his wife's adultery prior to Dec. 15, 1952, and no fresh evidence had been adduced to substantiate such a submission.

"(ii) Having regard to the conduct of the husband since 1942, the court could not see its way clear to exercise its discretion in favour of the husband."

The husband now appealed and in the course of the argument LORD MERRIMAN, P., raised the question whether the husband had adopted the correct procedure in applying to the justices to discharge the order of Dec. 15, 1952, instead of applying to the Divisional Court for leave to appeal out of time against that order.

Hoolahan for the husband.

J. R. Macgregor for the wife.

LORD MERRIMAN, P.: The appeal is out of time, and the first question was whether we should give leave to extend the time for filing the notice of appeal. That was resisted, and we said that we would deal with it when we had heard something about the merits of the case. It is clear that in the main the fact that the appeal was out of time was due to the attempt of the husband to get a civil aid certificate, but that application failed because his means as assessed were too great. It is said, therefore, that there is no merit in the application for an extension of time, but I may say that it is almost invariably regarded as a good ground for extending the time that the delay has been due to the obtaining of a civil aid certificate. I do not agree that the fact that he failed to obtain a certificate disposes of this point, for this reason—he might have obtained a certificate, and even though the assessment of his contributions was so stiff as

virtually to leave him to provide his own legal assistance, at least, on the assumption that he had obtained a certificate, it would have covered him for the costs. At the least, he might have been given a "limited" certificate, and that would have covered him for the costs of providing the statement of the justices' reasons, the notes of evidence, and so forth for the consideration of the legal aid committee. If, on the other hand, he had not been able to obtain those necessary things within the twenty-one days allowed for giving notice of appeal, with such extension as is now granted by the revised rule (r. 73 (3) of the Matrimonial Causes Rules, 1957) that he must lodge those documents as soon as practicable, it would mean that he himself, in any event, might have to shoulder the whole of those costs, because they could not be covered retrospectively by a civil aid certificate. In my opinion, on the facts of the present case the perfectly legitimate attempt by the husband to obtain legal aid was responsible for the short delay which was involved in waiting until that question was decided before going on at his own expense; and we know that no prejudice was, in fact, occasioned to the wife, because her advisers were informed of the intention to appeal. It is a clear case, in my opinion, for granting the extension of time, and I propose that that be done.

Now I come to the merits of the case, which raise a very curious and interesting point. For this purpose it is necessary to give one or two salient dates. The marriage occurred in October, 1933, and two children were born, in 1934 and 1940 respectively. Sometime between September and December, 1942, the wife committed adultery, but that fact was, as is admitted, entirely unknown to the husband at the time, and, indeed, as is admitted, remained unknown until, in the wife's divorce suit, which was heard on Feb. 22, 1957, the petition in which had been filed in February, 1956, it first became known, through the discretion statement put in evidence by the wife at that hearing, that she had committed adultery in 1942. I would like to say this, to make it plain beyond a peradventure, that from first to last, both before the justices and in this court there has been the clearest and most frank and unequivocal admission by counsel for the wife that the husband neither knew of this adultery nor by reasonable diligence could have known of it until the fact was proved on Feb. 22, 1957, out of the mouth of the wife herself. The next date of importance is Dec. 15, 1952, when the wife obtained the order which the husband by his present complaint seeks to have set aside. He seeks to have it set aside under the first part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he has shown cause on fresh evidence to the satisfaction of the court, which entitled the court at any time to discharge the order of Dec. 15, 1952, and the first question is whether he was entitled to proceed under s. 7 to that end.

At this point I ought to add that counsel for the husband has applied for, and, there being no opposition, has been granted, leave to add to his notice of motion an application to extend the time for appealing against the original order, with the implication that this court, if that application was granted, would then of its own motion set the order aside as having been obtained wrongly. It was obtained wrongly, because by the terms of s. 6 of the Act of 1895, the original Act in the code which gives justices jurisdiction in these matrimonial affairs, it is enacted:

"No order shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery."

It is now proved that the wife committed an act of adultery ten years before her complaint of wilful neglect to maintain which resulted in this order. It is

expressly admitted that there was no question of condonation. Indeed, the husband knew nothing about it, as is admitted, and it was not suggested, in the very full trial that was held at Lewes before Mr. Commissioner GALLOP, Q.C., in February, 1957, that there had been any question of connivance or conduct conducing to that act of adultery. In other words, as the facts now stand, it is plain that the justices, had they known of them, would have been bound to hold that they were without jurisdiction to make any order at all on the wife's complaint.

Then the question arises, how shall this be dealt with? Counsel for the husband has asked us to deal with it on the ground that this belated discovery of the adultery, albeit it is adultery which, unlike that under the second part of s. 7, was committed before the wife's complaint came up for hearing, enables the court to regard it as fresh evidence, and for that proposition he relies on the decision in *Weightman v. Weightman* (1), the court consisting of SIR GORELL BARNES, P., and BARGRAVE DEANE, J. I do not think that it is necessary to read the whole judgment, but I will read sufficient to show what they were deciding. SIR GORELL BARNES, P., in his judgment begins by saying:

"In the present case there was a summons taken out on the ground that fresh evidence had been discovered."

After reading the material words of s. 7, he said:

"But it is necessary that magistrates should clearly understand what 'fresh evidence' means, though in my view there is no real doubt about it."

He had already referred to *Johnson v. Johnson* (2) in which LORD ST. HELIER had defined the meaning of the words "upon fresh evidence", and that decision is summarised by SIR GORELL BARNES in these words:

"It was practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted; it must relate to something which has happened since the former hearing or trial [that does not arise in the present case] or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time."

The present case is precisely covered by those words, and it was admitted in the court below and has been admitted here that the wife's adultery in 1942 was, for the purposes of this application in 1957, "fresh evidence" upon which an order for discharge might have been made, and I am fully prepared to follow the decision in *Weightman v. Weightman* (1). I see that it is cited in the up-to-date textbooks as a valid decision which has never been questioned, and I see no reason to question it now. On the contrary, I think that it is plainly right, and it decided, incidentally (and this has been decided in other cases, too), that because of the use of the words "fresh evidence at any time" the six months' bar imposed by the Summary Jurisdiction Act, 1848, s. 11, on the hearing of any complaint which was over six months old did not apply, so that it is irrelevant that it was not until 1957, the earliest time at which, in fact, it could have been used at all, that this attempt to raise the question of fresh evidence in relation to something which occurred as long ago as 1942, first occurred.

It is rightly submitted that the wording of the section to which I have already referred, raises a question of discretion. Unlike the case in respect of adultery after the making of the order, which is dealt with in the second part of the section,

(1) (1906), 70 J.P. 120.

(2) 64 J.P. 72; [1900] P. 19.

where the word "shall", which has been held to be mandatory, is used, the wording of the first part of the section uses the word "may"—"A court . . . may on the application of the married woman or of her husband . . . upon fresh evidence . . . discharge any such order". It is said that we ought not to interfere with the discretion of the justices in a matter which is plainly discretionary after so long a lapse of time. Moreover, other reasons have been given, such as that even if this application succeeds it will not get the husband out of his difficulties, because it will still be open to the wife in the divorce suit to apply for maintenance. Speaking for myself, I am not impressed by that particular argument. I do not doubt that it will be open to the wife to persuade the court, if she can, that in spite of her adultery she ought to be allowed some maintenance, which may or may not equal, or exceed, or be less than that which the justices ordered. That is not our business at the present moment; but this, at any rate, is certain: that any such maintenance would operate only in futuro, whereas if an order of this sort were left undealt with, it might in certain circumstances, though I gather it would not in this particular case, leave a husband with arrears under the order hanging round his neck, with the penal consequences which that might involve. It does not seem to me to be a valid reason for leaving intact a magistrates' order which ought never to have been made, that some such order might be made in the Divorce Court with whatever consequences might result in the future.

To my mind, however, there is a more fundamental objection to leaving this order in effect simply on the ground that the justices have exercised their discretion. It is elementary that any discretion in the court must be exercised judicially, and if it is shown that in any vital matter the justices have gone wrong in dealing with the point, that in itself is a justification for interfering with the exercise of their discretion, and, in my opinion, that is the present case. Within three days of the decision, and in response to an oral request made on the date of the hearing to the justices to state the reason for their decision, the clerk to the justices gave reasons which are verbally identical, so far as I can judge, with those which are stated in the notes of the hearing and the reasons for the decision. The first reason reads:

"The court was not satisfied that the husband had established that he was unaware of his wife's adultery prior to Dec. 15, 1952, and no fresh evidence had been adduced to substantiate such a submission."

That is flat in the face of the very clear admission made by counsel for the wife that those points were expressly admitted, as I have already said, and I repeat that it has really been common ground from first to last, that so far from the husband not having established that he was unaware of his wife's adultery prior to the date of the making of the order in question, it was expressly admitted that he first heard of it, and could not have heard of it earlier by any reasonable diligence, when the wife put in her discretion statement on Feb. 22, 1957, and, moreover, it has been expressly admitted and has been common ground throughout, that that discovery did amount to fresh evidence. The whole of the justices' reasons, in my opinion, is tainted by this extraordinary mistake.

That obviates the necessity of my going into the second reason that they give, that there were some letters read to show, I gather, that the husband had, as it is said, not been entirely free from matrimonial laxity from 1942 onwards in connexion with his friendship with ladies other than his wife. I do not gather that it is suggested that he had committed adultery, and, as I have already said, it was not suggested that his friendships with other people had amounted or, indeed, could amount to conduct conducing to the adultery in question. But my answer is that the justices have given a reason which, if valid, cuts at the

root of this jurisdiction to make the order which was sought by the husband, because, unless there was fresh evidence they had no right to listen to the complaint at all. Having given a reason which is quite unsustainable, I do not think that it is necessary to go any further in considering whether they exercised their discretion rightly or wrongly.

I would like to add this, if I have not made it clear already, that if I did not think that this appeal could be supported on the authority of *Weightman v. Weightman* (1) I should have been prepared to give leave to appeal out of time against the original order, and, having done so, to set it aside on the merits, for precisely the same reasons as those which I have already given, which are covered by *Weightman v. Weightman* (1). In my opinion this appeal should be allowed, and the original order set aside for the reasons stated.

STEVENSON, J.: I agree.

Appeal allowed.

Solicitors: Dale Parkinson & Co.; Vizard, Oulham, Crowder & Cash, for Parker & Bangor-Jones, Worthing.

G.F.L.B.

(1) (1906), 70 J.P. 120.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND STEVENSON, J.)

October 31, November 1, 12, 13, 14, 1957.

BYATT v. BYATT

Husband and Wife—Appeal—Fraud—Notice of motion—Jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 11.

The fact that the ground of appeal is fraud or conduct akin to duress does not make it improper to proceed by motion on an appeal in order to obtain the discharge of a separation order made by justices on the ground of the wife's adultery.

APPEAL against an order of the Edmonton justices.

By a complaint dated Aug. 16, 1956, the husband alleged that the wife had within the preceding six months been guilty of adultery with a person unknown at a place unknown. The wife did not attend the hearing of the complaint and the case proceeded in her absence. Two letters written by the wife were put before the justices, one addressed to the husband, the other addressed to the court, in both of which she said that she had committed adultery. The justices made a separation order in favour of the husband. The wife appealed by notice of motion in which she asked for leave to admit fresh evidence and alleged as her grounds of appeal, among others, that the two letters produced before the justices had been written by her under fear and duress and at the dictation of the husband; that the admission of adultery was, as the husband well knew, untrue; and that she had never committed adultery; and the wife filed an affidavit setting out her version of the facts. At the hearing before the Divisional Court it was contended that it was not proper to proceed by motion to raise allegations of this nature, and the case is reported on this procedural point.

Dunlop for the wife.

Curtis-Bennett for the husband.

Nov. 1. **LORD MERRIMAN, P.:** About the preliminary point I merely wish to say this, out of courtesy to the Court of Appeal, so that they may know what our views on the matter are. A preliminary point has been taken, which is based on the Matrimonial Causes Rules, 1957, r. 73 (2). This provides that an appeal from justices under s. 11 of the Summary Jurisdiction (Married Women) Act, 1895,

"shall be by notice of motion stating the grounds of appeal and whether the whole or a part only of the order is complained of."

In the present case we have extended the time for the wife to appeal against a finding of adultery on which, on the complaint of the husband, the justices have made a separation order. The wife has filed an affidavit the substance of which, without going into detail, is that, at the demand of her husband, she wrote a letter, some time before there were any proceedings in the magistrates' court, admitting adultery, and when the proceedings were started by the husband's complaint she wrote a further letter to the court in which she confirmed her admission of adultery. The wife did not attend the court and the case proceeded in her absence. The husband gave evidence which was, in effect, limited to producing those letters. The wife has filed an affidavit in which she says, rightly or wrongly, that the whole thing is false, that she was afraid of her husband, and that, in effect, she was forced to write these letters. The word duress has been used. It may or may not be the proper term in the circumstances. It is alleged that the husband put forward those letters in circumstances in which he knew them to contain false statements—in other words that this separation order was obtained contrary to the justice of the case.

This separation order has not merely the immediate effect of condemning the wife as an adulteress in any magistrates' court proceedings—it plainly would, I think, prevent her from bringing any claim in a magistrates' court for maintenance, for, as long as this order stands, she would be confronted with an order of a court of competent jurisdiction which would be conclusive against her—but this separation order has also wider implications than that, because it could be produced under s. 7 (2) of the Matrimonial Causes Act, 1950. That enactment provides:

"On any such petition [petition presented by a petitioner who has been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce] for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery . . . but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner."

This separation order has, therefore, a potential bearing of very great importance on the status of the parties.

I mentioned that appeals, the right to bring which is derived from s. 11 of the Act of 1895, are to be by motion to this court. We have been confronted with the preliminary point that this motion is wholly improper. It is not put as high as to say that there is no right to bring the motion, but there has been cited the judgment of LORD BUCKMASTER in *Jonesco v. Beard* (1) in which he says:

"Viewed simply as a matter of procedure the course taken was irregular. It has long been the settled practice of the court that the proper method of

Eng. Res.

impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires . . . That, however, there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial may be accepted."

Then LORD BUCKMASTER cites *Hip Foong Hong v. Neotia & Co.* (1) in which, after saying that the trial had been held below and dealt with on the merits, he had added:

" . . . where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient."

It will be observed that in both those cases, the appeal in the House of Lords and the appeal in the Privy Council, the whole merits were gone into in spite of the cautionary note that it was better not to proceed by notice of motion but to proceed by action. Both cases recognised that there may be occasions on which it is convenient to proceed in the way now before the court, and in my opinion the class of civil action of which LORD BUCKMASTER was speaking is very far removed from the sort of thing with which we are dealing here. Indeed, I go further. It seems to me that a very close analogy is provided by another aspect of our jurisdiction. I refer to the cases under the Matrimonial Causes Rules, 1957, r. 36 (1), under which this court can entertain applications for the rehearing of cases in which a decree nisi has been pronounced where no error of the judge at the trial is alleged. So far, let me say, the rule is strictly analogous. It is conceded, and it could not be otherwise than conceded, that these two separate written confessions, one addressed to the husband and the other addressed to the clerk of the court, could properly be accepted by the justices, with the husband's own evidence, as proving the charge which he brought. I do not go into the question whether it would have been better to secure the attendance of the wife before acting solely on her written confession; I content myself with saying that they were entitled to act on it. So that no error at the trial can be alleged.

It is true that in cases under r. 36 (1) it is not necessary that fraud should be the ground of the application. Speaking generally, the ground is usually that for some reason or another, and it may even be deliberate abstention by the party bringing the application, a party who really wishes to defend has not had an opportunity of defending. Fraud is not necessarily involved, but it sometimes is, and I can recall many cases where there has been some deliberate trick to avoid the respondent having, for example, notice of the date of the trial, or where an affidavit of service, which was in fact false, has been imposed on the court; but it has never been suggested, in my experience, that merely because it is necessary to move this court to set aside the decree nisi and order a rehearing before another judge the fact that fraud is alleged is a bar to proceeding by motion. I think myself that merely as a matter of convenience, though it is not a complete analogy, the procedure under r. 36 (1), which is in effect the procedure adopted in the present case, of supporting the motion with an affidavit

(1) [1918] A.C. 888.

of the circumstances on which the application is based, is a very close analogy. In my opinion this preliminary point is quite hopeless and ought to be disallowed, as we have disallowed it.

There remains, then, the question, how to deal with this matter? As the matter stands at present the wife alone has filed an affidavit, the husband so far has not, possibly because of the supposed validity of this preliminary point or for some other reason, chosen to answer it, although when it came to the point we were told that there is actually in court a completed draft of the affidavit which it is now desired to file. However, we are not shutting the husband out because of his delay. After all, the wife is out of time, and we have extended the time for her, and we are prepared to deal with the husband by the same measure. We have given leave to the husband to file an affidavit. If it is felt to be right, as it may very well be, that this matter should not stand simply on cross-affidavits, we have given leave for either side to give notice to cross-examine the other. That, as far as one can see, should enable us on oral evidence to decide the essential question whether the husband has put forward these letters knowing them to be false. If so, there would be the question whether there is any other evidence of adultery, and it would be possible to suggest this to the wife in cross-examination on her affidavit, in which she says that she never has committed adultery. However that may be, we think that that aspect of the matter should be left until it arises in practice, but we do think that it is desirable that the question Aye or No, has this husband put forward evidence which he knew to be false, should be dealt with by oral evidence rather than be dependent on conflicting affidavits. So, having given leave to either party to give notice to cross-examine the other, we simply give leave to apply to fix a suitable day, when we are prepared to hear the evidence.

STEVENSON, J.: I agree.

[Nov. 14. The court, having heard the oral evidence of both parties and their witnesses, allowed the appeal and discharged the order of Sept. 6, 1956.]

Order accordingly.

Solicitors: *S. Beach & Co.; J. C. Martin.*

G.F.L.B.

BIRMINGHAM ASSIZES

(SALMON, J.)

July 10, 11, 12, 15, 1957

R. v. SHARP

Criminal Law—Trial—Plea—Fitness to plead—Mute of malice—Burden of proof.

The burden of proving that a prisoner is mute of malice, and not by visitation of God, is on the prosecution. Where on the evidence there is any doubt about the prisoner's condition the jury must find him mute by visitation of God.

If the jury find the prisoner mute by visitation of God, the burden is then on the prosecution to show that, despite his muteness, he is capable of pleading to and taking his trial on the indictment. The test is whether he can communicate, by signs, writing, or other means, with his advisers and with the court. If he cannot, he is not fit to stand his trial.

TRIAL on indictment.

The defendant, George Myhill Sharp, was charged before SALMON, J., and a jury on an indictment containing a number of counts charging him with offences against young girls. On arraignment, the defendant stood mute, and a jury was impanelled to try the issue whether he was mute of malice or by visitation of God. The case for the prosecution was opened, and evidence was called both by the prosecution and by the defence.

At the request of counsel for the prosecution for a ruling on the question who should first address the jury, SALMON, J., after hearing counsel for the defence, who referred to *R. v. Turton* (1) (counsel for the prosecution not dissenting), decided that the onus of proving that the accused was mute of malice was on the prosecution, and that, as evidence had been called on both sides, counsel for the defence should first address the jury. His LORDSHIP then heard counsel's submissions on the question whether the standard of proof on this issue was the standard normally required in criminal cases or the standard of a balance of probabilities, and intimated that, while the balance of probabilities was one of the matters to be taken into account, he would direct the jury that before they could find the accused to be mute of malice they must be quite satisfied that that was the fact. Counsel then addressed the jury.

King-Hamilton, Q.C., and *Garrard* for the Crown.

Gillis, Q.C., and *Allardice* for the defendant.

July 10. SALMON, J., summing-up to the jury on the issue mute of malice or mute by the visitation of God, said that the question which they had to decide was one of great importance, because, if the defendant failed to answer to the arraignment through no fault of his own, it would be manifestly most unfair that he should be found to be mute of malice. If, on the other hand, the muteness was assumed for the purpose of avoiding or postponing the trial, it was important from the public point of view that the ruse should not be successful. If the trial were postponed, all the witnesses might not, perhaps, be available when it eventually came on for hearing, and also, the witnesses, particularly the young witnesses, might have forgotten. His LORDSHIP went on to say that sometimes a defendant was mute because he had had a stroke, or because there was some injury to his larynx, or because of some other physical cause; and it was then comparatively easy for a jury to decide whether his condition was genuine. In the present case, however, it was not suggested that there was anything physically wrong with the defendant; it was suggested that his inability

(1) (1854), 6. Cox. C.C. 385.

to speak was due to some emotional or psychological cause, and, as there had been differences of opinion among the doctors who had given evidence, the question which the jury had to decide was a difficult one. The jury must, however, do their best to decide it after a consideration of the whole of the evidence. If, after considering all the evidence, they were completely satisfied that the defendant was "shamming", they were to find that he was mute of malice, but, if they were not satisfied of that, if, having weighed all the evidence, their minds were left in the state of faint suspicion and they were not satisfied, then they were to find that the defendant was mute by the visitation of God. His LORDSHIP, having reviewed the evidence on this issue, said, in conclusion, that if the defendant was mute of malice, a verdict of "Not guilty" would be entered and he would be tried, and that, if he were found to be mute by the visitation of God, then the jury would have to hear further evidence and consider whether he was fit to stand his trial.

[The jury returned a verdict that the defendant was mute by the visitation of God.]

July 11. Counsel for the prosecution, having referred to *R. v. Pritchard* (1), *R. v. Dyson* (2), *R. v. Berry* (3), and *R. v. Stafford Prison (Governor)*. *Ex p. Emery* (4), submitted that there were two questions—(i) whether the accused was fit to plead, and (ii) whether he was fit to stand his trial, and that these two questions should be tried separately. After hearing counsel for the defence, SALMON, J., ruled that the question should be left to the jury in this form: "Is he capable of pleading to the indictment and of standing his trial?" The jury was then sworn according to the following form:

"I swear by Almighty God that I will faithfully try whether George Myhill Sharp, the prisoner at the Bar, who stands indicted with felony and misdemeanour, is capable of pleading to and of taking his trial on the indictment, and give a true verdict according to the evidence."

Counsel for the defence then submitted that the burden of proof was on the prosecution, and referred to *R. v. Roberts* (5), *R. v. Beynon* (6), and *R. v. Davies* (7). After hearing counsel for the prosecution, His LORDSHIP ruled that the prosecution should put before the court the evidence that was available to them and should begin. Counsel for the prosecution accordingly opened the case, evidence was called for the prosecution and the defence, and counsel for the defence and counsel for the prosecution addressed the jury.

SALMON, J., summing-up to the jury, said that, when a question arose whether a defendant was capable of pleading to the indictment and standing his trial, it was the duty of the court to make sure that he was capable of doing so before the trial was allowed to proceed, because it was repugnant to one's sense of justice that a person should be on his trial if he was unable to plead and unable properly to stand his trial. It was, therefore, the duty of the jury to decide whether they were satisfied that the defendant was fit to plead. If they came to the conclusion that the defendant could not communicate with his advisers, or with the jury if he were called to give evidence, he was not fit to stand his trial,

(1) (1836), 7 C. & P. 303.

(2) (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n.

(3) (1876), 40 J.P. 484; 1 Q.B.D. 447.

(4) 73 J.P. 284; [1909] 2 K.B. 81.

(5) 117 J.P. 341; [1953] 2 All E.R. 340; [1954] 2 Q.B. 329.

(6) [1957] 2 All E.R. 513.

(7) (1853), 3 Car. & Kir. 328.

and, therefore, the real question on which the jury must be satisfied was whether the defendant was fit to communicate with his advisers and with the court. The fact that the defendant was mute was not conclusive on this point, because, although he could not speak, he might be able to communicate sufficiently with his advisers by signs or writing, and with the court in writing. If the jury were satisfied that the defendant could communicate in writing, they must then also consider whether he could understand, because a defendant could not stand his trial unless he was able both to communicate and to understand. His LORDSHIP then reviewed the evidence.

[The jury returned a verdict that the defendant was capable of pleading and of taking his trial on the indictment. The trial then proceeded on the general issue, and the defendant was found guilty and was convicted.]

Solicitors: *Director of Public Prosecutions; Hawley & Phoenix, Longton.*

G.F.L.B.

CENTRAL CRIMINAL COURT

(SLADE, J., AND A JURY)

November 6, 7, 8, 11, 12, 13, 14, 1957.

R. v. JOYCE

Criminal Law—Evidence—Statement to police—Inducement to make statement—Interview with police officer before being charged—Accused told officer would "need" statement from him.

A police officer who was investigating complaints of incest and indecent assault against the accused invited him to go to the police station, saying: "I need to take a statement from you". The accused accompanied the officer to the station where a statement was taken from him. At the trial the defence submitted that this statement was not admissible in evidence because the words used by the officer amounted to an inducement relating to the accusation although in fact the accused was not charged with the offences until several weeks after the interview.

HELD: the statement was admissible in evidence, since the words "I need to take a statement from you", or even words conveying a suggestion that a person might have to accompany police officers to the station because they needed a statement from him when he got there, were not an inducement in any way relating to the charge or accusation.

TRIAL on indictment.

The accused, John Stanislaus Joyce, was charged, on an indictment containing two counts of incest with his daughter, aged fifteen, and two counts of indecent assault against her. He was found Not Guilty on all counts and was discharged. The case is reported only on the legal submission made by the defence that statements alleged to have been made to a police officer before he was charged were inadmissible.

It was proved in evidence that on the morning of Sunday, July 28, 1957, the daughter lodged a complaint against the accused at the local police station. On the same day at about 11.30 p.m. Detective Inspector Carter and another officer called on the accused at his home, told him that they were police officers investigating a complaint made against him by his daughter, and invited him to accompany them to the police station. During the conversation the words said to have been used by the police inspector were: "I need to take a statement from you". The accused, who had at once denied that he was guilty of any offence against his daughter, finally agreed to go to the police station where he made a statement

which was taken down in writing and orally answered questions. He refused to sign the statement. He was arrested in September, 1957, and charged with the offences set out in the indictment. When the police inspector was called, counsel for the defence, in the absence of the jury, submitted that the evidence showed that the accused was taken to the police station against his will before any charge had been laid against him and that the words used by the inspector: "I need to take a statement" really amounted to an inducement rendering the statement inadmissible.

Buzzard and M. Worsley for the Crown.

A. S. Wells for the accused.

SLADE, J.: I do not want to say more than is necessary now, since the case, of course, is to continue with the jury.

I have considered the submission at some length because it is disquieting for anyone who has to try a number of sexual cases to observe, on the one hand, the proportion in which an acquittal takes place through lack of corroboration and because of the warning which the judge is bound to give to a jury; and to observe, on the other hand, the number of cases where corroboration is found in some oral statement alleged to have been made by the accused and to constitute an admission which, if put into the context for which the defence contends, may well have amounted to a denial or at least to no more than a colourless explanation of his alleged conduct. I am not going to say more because counsel know what I mean in this particular case.

The objection to the admissibility of this evidence arises in this way. Certain incidents were alleged by the complainant which culminated in an incident on the morning of Sunday, July 28, 1957. Later that day the complainant went to the police station and made certain accusations against her father. At 11.30 p.m. two police officers called at the father's house. They stated who they were, explained the nature of their business, and had some conversation with him in which he denied the accusations that his daughter had made against him. Then, having made a search of the accused's clothing, they invited him (to use a neutral word) to accompany them to Clapham police station.

The accused, who had been in bed, had been awakened and had hastily put on a pair of trousers over his pyjamas. He had been working all that day, although it was a Sunday, and, being not unnaturally reluctant to turn out at that hour of the night, demurred at first to accompanying them to the police station but then said: "All right, I will come with you then. She has been stopping out, you know, and she has been telling lies. I have had to chastise her". That is according to the police evidence. Then, again, according to the police evidence, which on this point is rather more favourable to the accused than his own evidence in the witness-box in the absence of the jury during the trial, Detective Inspector Carter told the accused, and he was confirmed in substance by Detective Sergeant Coleman, that he would need to take a statement from him.

It is right to say that the accused probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) he had very little choice in the matter, and I will assume that that was the reason why he did so. It is further fair to say that the accused might very well have refused to answer any questions at all, even the formal ones as to the members of his family and their ages and who occupied the bedrooms and so on and so forth, if he had not been previously told: "I need to take a statement from you".

The question which I have to ask myself is whether that is a sufficient inducement in law to exclude any admission thereafter alleged to have been made by the accused. That it is an inducement of some kind is manifest. One would not normally leave one's house to go to the police station about midnight if one had not been asked to do so in such terms that one thought one had no choice in the matter, and that must mean that there was an inducement operating on one's mind to make one go. If one makes a statement after being told, "I need to take a statement from you", then obviously some inducement in the colloquial sense is held out to one to make it; but an inducement of that nature is not a sufficient inducement in law to render inadmissible a statement resulting from it. To render a confession or admission admissible the prosecution must prove affirmatively that no inducement relating to the charge or accusation was held out to the accused to make it. A confession or admission must be excluded if it is made (i) in consequence of (ii) any inducement (iii) of a temporal character (iv) connected with the accusation or relating to the charge (v) held out to the accused by a person having some authority over the subject-matter of the charge or accusation.

In my judgment the words, "I need to take a statement from you", or even words covering a suggestion that a man will have to come to the station because the police need to take a statement from him when he gets there, is not an inducement in any way relating to the charge or accusation. The prosecution therefore have satisfied me that evidence is admissible of the oral admissions alleged to have been made by the accused.

Solicitors: *Director of Public Prosecutions; Alexander A. Kassman.*

G.F.L.B.

COURT OF APPEAL

(LORD EVERSHERD, M.R., ROMER AND ORMEROD, L.J.J.)

November 21, 22, 1957

ST. PANCRAS BOROUGH COUNCIL v. LONDON UNIVERSITY

Rates—Limitation of rates chargeable—Organisation concerned with the advancement of education—Notice terminating the limitation—Time for service—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2. c. 9), s. 8 (3).

The ratepayers were an organisation to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied. On March 21, 1956, notices dated March 20, 1956, were served by the borough council on the ratepayers under s. 8 (3) of the Act informing them that as from March 31, 1959, *i.e.*, after three years, the privileges conferred on them as ratepayers by s. 8 (2) (b) of the Act would cease to apply to their hereditaments. The first year of the new valuation list began on April 1, 1956, and ended on March 31, 1957. On the question whether the notices were ineffective on the ground that they could not be validly served until a year subsequent to the first year of the new valuation list,

Held: no notice under s. 8 (3) of the Act of 1955 could be served until after the fulfilment of the condition in para. (b) of sub-s. (2), *i.e.*, after the expiration of the first year of the new valuation list, and, accordingly, the notices were prematurely served and invalid.

APPEAL by the plaintiffs, the metropolitan borough of St. Pancras, from an order of WYNN-PARRY, J., reported 121 J.P. 422, declaring that on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,

s. 8 (2) and (3), a notice, dated Mar. 21, 1956, served by the plaintiffs, the rating authority, purporting to terminate as from the end of March, 1959, limitation of rates chargeable on the ratepayers, the University of London, was premature and invalid.

Megarry, Q.C., and *Fletcher-Cooke* for the rating authority.

Wilberforce, Q.C., and *W. B. Harris* for the ratepayers.

LORD EVERSHERD, M.R.: In my judgment, this is really a plain case, and I entirely agree with the conclusion which WYNN-PARRY, J., reached. The question is one (in the end of all) of the effect, as a matter of English, of the first two-and-a-half lines of s. 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Section 8 was concerned to give to certain organisations a privilege, or the chance of a privilege, under the Act of 1955. There is no question that the ratepayers, the University of London, the respondents to this appeal, are an "organisation" within the scope of the section; and I, therefore, need not refer to s. 8 (1). Section 8 (2) states the nature of the privilege which may be obtained; and it is of two kinds, or rather (as counsel for the ratepayers put it to us) it arises in two distinct phases. The first phase is covered by para. (a) and is during what is called "the first year of the new list"—i.e., the new valuation list. The first year of the new list began on Apr. 1, 1956. During that year an organisation of the type mentioned, if it remains such at all relevant times, is not to be chargeable for rates in any sum exceeding that in respect of which it was charged for the last year of the old list. Then para. (b) of the sub-section deals with the succeeding years; and, again assuming that the hereditament in question remains unaltered and that the organisation still remains one within the scope of sub-s. (1), the proportion of the new rate for the second and subsequent years which the organisation will bear in respect of the given hereditament will be the same proportion as the rate actually paid during the first year of the new assessment bore to the rate which, apart from the sub-section, would have been chargeable. Sub-section (3) gives to rating authorities the right to determine, or put a limit on the extent or duration of, those privileges. I may add that by s. 8 (4) the rating authority is given a further discretion (notwithstanding, as I understand it, anything else that it may have done or not have done) to make remissions in cases of particular ratepayers—all of which goes to show that the section, over a period of time (and again I am borrowing from what fell from counsel for the ratepayers), is designed to give a breathing space during which it may be seen how the new rating will work in practice, particularly in regard to organisations of the kind mentioned.

I return to s. 8 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which gives to the rating authority the power to determine privileges. It opens as follows:

"Where para. (b) of the last preceding sub-section has effect in the case of a hereditament, the rating authority may at any time give notice to the occupiers of the hereditament that, as from the end of a year specified in the notice, being a year ending not less than thirty-six months after the date on which the notice is given, the limitation imposed by virtue of that paragraph shall either cease to apply to the hereditament or shall be modified as mentioned in the notice . . ."

I have stated that in this case the first year of the new list began on Apr. 1, 1956. The Act itself had come into operation on July 27, 1955. The rating authority in this case, the Mayor, Aldermen and Councillors of the Metropolitan Borough

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of St. Pancras, had, let it be said, made themselves very alert as to the nature and extent of their duties and powers under this new Act; and, on Mar. 21, 1956, before the first year of the new list had begun, they served what I may call a sub-s. (3) notice on the University of London in respect of the hereditament in question. If that notice was a good notice, then it would take practical effect from the end of the year specified in the notice, being the "year ending not less than thirty-six months after the date on which the notice" was given. Thus this notice, if good, would begin to operate after Apr. 1, 1959. The University of London, however, challenged the validity of the notice on the simple ground that it was premature and that sub-s. (3) did not and could not, on a fair significance of its terms, have contemplated the giving of a notice before the second year of the new list began, or at least before the first year of the new list began. It did not appear that the rating authority gave any other notices *ex abundante cautela*; so that it is conceded now that if they were premature in serving this notice, they will not be able to bring in the limitation which such a notice might operate to effect until April, 1961, thereby suffering a substantial loss for the borough. WYNN-PARRY, J., came to the conclusion that the notice was invalid.

The real force, I think, of the argument of counsel for the rating authority lay in the use of the three words "at any time"; for, he submitted, "at any time" means "at any time". This Act came into operation on July 27, 1955. His submission is that at any time after the Act was part of the law of the land such a notice may be given; and that his notice is within the terms of the Act, and should take effect accordingly. I cannot, for my part, accept that argument. A first reading of this sub-section to my mind produces the effect for which counsel for the ratepayers contends. I would read it, as a matter of first impression, as meaning that when year two has begun, then at any time, i.e., at any time thereafter, a rating authority may serve such a notice. The argument has subjected the sub-section to a closer analysis than a mere reliance on first impression. None the less, the closest analysis has not served (in my case) to disturb the first impression which the words made on my mind. It seems to me that the most formidable answer to the argument of counsel for the rating authority lies in the express reference to "para. (b) of the last preceding sub-section"; for if the words "has effect" should be taken as meaning no more or no less than "is operative in law", then there would be no point in making specific reference to para. (b): the whole section was in operation from July 27, 1955. In other words, it seems to me that, on a fair reading, and after, indeed, a close scrutiny of the language, these words "Where para. (b) of the last preceding sub-section has effect in the case of a hereditament" operate to introduce, as WYNN-PARRY, J. said:

"... a condition, namely, that the particular case must fulfil the conditions of para. (b) of sub-s. (2) before the notice contemplated ... can be given ..."

I entirely agree with that; and I think that that view of it is reinforced by the general character of the section, which counsel for the ratepayers expressed as contemplating a series of quite definite phases—the first year of the new list, the second and later years of the new list, and then, once the latter period had begun and that phase had been entered into, the possibility of limitations imposed by notice on the part of the local authority. If that is right (as I think

it is), if that is the real meaning of these words "Where para. (b) of the last preceding sub-section has effect", then the introduction of the word "thereafter" into the subsequent language after the words "at any time" is not involved: the sub-section means what it says, that, given the condition, then at any time (i.e., without any limit as to time) the rating authority may give a notice. The words "has effect", in such a context, therefore, mean "has practical effect."

Counsel for the rating authority relied particularly on s. 8 (5), which provides:

"The preceding provisions of this section, and the provisions of Sch. 5 to this Act, shall have effect, with the necessary modifications, in relation to rates charged for a rate period forming part of the first year of the new list, or of any subsequent year, as they have effect in relation to rates charged for the first year of the new list or for any subsequent year, as the case may be."

I cannot (with all respect to him) derive the significance which counsel seeks from that sub-section. It is surely only asserting, in language appropriate for the purpose, that if, in consequence of the operation of the provisions of Sch. 5, there is a change in the rates during a given year, be it the first year or a subsequent year, then the various preceding provisions of the section are to operate and "have effect" as regards the relevant part of the year as they otherwise would as regards the whole year. That does not seem to me to throw any real light on the way in which these words are used in sub-s. (3); and I think that they are there used (as I interpret them) in a way in which it is common for such words to be used.

If I elaborate the matter further, I should, I think, merely be guilty of repetition. I am content to leave it thus, stating my entire concurrence with the view expressed by WYNN-PARRY, J. I must, however, add one qualification or reservation. So far as this case is concerned, the facts being as I have stated them, it suffices to say that, in my judgment, "has effect" cannot be given the meaning "operative in law"; so that the notice which was here given on Mar. 21, 1956, was a bad notice. A view has been intimated, which counsel for the ratepayers was prepared to support as an alternative ground of appeal, that at any rate an effective notice under sub-s. (3) could not be given before the first year of the new list had begun. After the first year of the new list had begun, that is to say, after para. (a) of sub-s. (2) had come into practical effect, it then followed that para. (b) would ensue in effect unless the organisation ceased to exist or altered its character, or some supervening event of that sort occurred. So it might be said that, although para. (b) was not in effective operation in this case before Apr. 1, 1957, at any rate after Apr. 1, 1956, its future operation could be forecast with reasonable certainty. In the view that I take, it is unnecessary to express any opinion on that point; and I, therefore, desire to leave open for future argument (if it should ever arise) the question whether an effective notice under sub-s. (3) might be given during the first year of the new list. My present inclination, I confess, is against that view; but I express no final conclusion on it. So far as this case is concerned it suffices to say that this notice, given, as it was, on Mar. 21, 1956, was premature and invalid. I therefore would dismiss the appeal.

ROMER, L.J.: I agree that, notwithstanding our decision in this case, as a matter of theory at least it would be open to a rating authority in some other case to submit and contend that a notice, given during the first year of the new list was a valid and effective notice, because the point is not before us. Subject to that, and on the main point which has been argued before us, I agree so wholly with the judgment of WYNN-PARRY, J., and with the reasoning and conclusions that LORD EVERSHED, M.R., has expressed that there is nothing I wish to add.

ORMEROD, L.J.: I agree also.

Appeal dismissed.

Solicitors: *Town Clerk, St. Pancras Borough Council; Slaughter & May.*

F.G.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND ORMEROD, L.JJ.)

November 7, 8, 26, 1957

BERRY v. ST. MARYLEBONE CORPORATION

Rating—Relief—Organisation concerned with advancement of religion, education or social welfare—Theosophical Society in England—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

Evidence—Rating—Limitation of rates chargeable—Charitable organisation—Main objects—Construction of written constitution—Meaning attached by members—Activities of organisation—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

The Theosophical Society in England was a component national society of an international society, incorporated under the laws of India; it was not established or conducted for profit. Its first main object as set out in its memorandum of association was "to form a nucleus of the universal brotherhood of humanity without distinction of race, creed, sex, caste or colour". Evidence was filed on behalf of the society with an explanation of theosophy and of what theosophists believed, the meaning which they attributed to their main objects, and the past and present activities of the society. The meaning of the first main object was explained as follows: "To form an ever expanding group of persons who are aware of the universal brotherhood of man which is implied by the Fatherhood of God and who believe in working for the diminution and final abolition of all intolerance and discrimination relating to race, creed, sex, social class and colour". On the question whether the society was an organisation the main objects of which were concerned with the advancement of religion, education or social welfare within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,

Held: (i) in order to ascertain for the purpose of s. 8 (1) (a) of the Act of 1955 the main objects of an organisation with a written constitution, resort should normally be had to its constitution alone unless some word or phrase had in relation to the organisation a special meaning; evidence of how members explained the meaning of their objects was inadmissible; and evidence of the activities of an organisation was only relevant on an inquiry as to its main objects.

(ii) at least one of the main objects of the society was neither charitable nor concerned with the advancement of religion, education, or social welfare, for it was concerned also with many other matters as well, and, therefore, the society was not an organisation to which s. 8 (1) (a) applied.

APPEAL by the plaintiff, Alice Lilian Berry, suing on behalf of the Theosophical Society in England, from a decision of WYNN-PARRY, J., reported 121 J.P. 250, that the society was not an organisation to which s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied, viz., an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

Honeyman, Q.C., and *Taverne* for the plaintiff.

Cross, Q.C., and *J. L. Arnold* for the corporation.

Cur. adv. vult.

Nov. 26. **ROMER, L.J.**, read the following judgment of the court: This is an appeal from an order of WYNN-PARRY, J., in proceedings brought by the plaintiff, Mrs. Alice Lilian Berry, suing on behalf of the Theosophical Society in England (hereinafter referred to as "the society"), in which she sought a declaration that, on the true construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the society is an organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. Had the application succeeded, the society would have become entitled to the rating relief which is provided by the section. By the order of the learned judge, however, it was declared that the society is not an organisation falling within the section, and the plaintiff now appeals from that order.

The application was supported by an affidavit sworn by the plaintiff, who is the general secretary of the society and has been a member thereof since 1911. By that affidavit it is stated that the society is a component national society of the General Council of the Theosophical Society ("the international society"). The affidavit further states as follows in para. 2 and para. 3:

"2. The international society . . . was founded in New York in 1875 and was incorporated in India in 1905 under Act 21 of 1860 of the Governor-General of India entitled 'An Act for the Registration of Literary, Scientific and Charitable Societies, 1860'. The headquarters of the International Society are at Adyar, Madras, India. The objects of the international society as set out in its memorandum of association are as follows: '(i) To form a nucleus of the universal brotherhood of humanity, without distinction of race, creed, sex, caste or colour. (ii) To encourage the study of comparative religion, philosophy and science. (iii) To investigate unexplained laws of nature and the powers latent in man'; and ancillary objects including the maintenance of libraries.

"3. The English society . . . is an unincorporated society. It was formed in 1888 and has as its object the promotion of the objects of the international society with special reference to England. It is the occupier of the premises at 50, Gloucester Place, London, W.1. The property of the society is held on trust for its members by the English Theosophical Trust, Ltd. . . . which is a limited company incorporated under the Companies Acts of 1908 and 1913. The chief sources of income of the society are subscriptions, donations and legacies. The society and the international society are non-profit making organisations and are run almost entirely by voluntary work. The expenditure of the society is confined to the promotion of the objects of the international society as set out in para. 2 hereof."

The remainder of the plaintiff's affidavit deals, as hereinafter appears, with an explanation of theosophy and of what theosophists believe, the meaning which

they attribute to their three main objects, and with the past and present activities of the society.

Section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides as follows:

"This section applies to the following hereditaments, that is to say—

(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . ."

Then that is followed by a proviso, which is immaterial to the present case. The learned judge held that it was clear that the society was not established or conducted for profit and that its main objects were the three objects stated by the plaintiff in her affidavit. His decision that the society is not an organisation within s. 8 of the Act was founded on the view that the first of its objects is not charitable and is not "otherwise concerned with the advancement of religion, education or social welfare".

The three main objects of the society came up for consideration by the House of Lords in 1933 in *Re Macaulay's Estate. Macaulay v. O'Donnell* (1). Under the will of a testatrix her residuary estate was given to the Folkestone Lodge of the society for purposes which, as the House held, involved a perpetuity; and the further question then arose whether the gift was saved from failure on the grounds that the objects of the society were charitable. The speeches of LORD BUCKMASTER and LORD TOMLIN are printed as a note to *Re Price* (2). The case had come before CLAUSON, J., at first instance and a part of his judgment was referred to in the judgment of COHEN, J., in *Re Price. Midland Bank Executor & Trustee Co., Ltd. v. Harwood* (2). COHEN, J., expressed the view that, in the opinion of CLAUSON, J., the second and third objects of the society were valid and charitable purposes and that the observations of LORD TOMLIN in the House of Lords indicated that he did not dissent from this view. Both LORD BUCKMASTER and LORD TOMLIN were clearly of the opinion that the first object of the society was not charitable and that, as it was separate from and independent of the other two objects, the gift was invalid. LORD TOMLIN said:

"Whatever may be said of the objects indicated in ell. (b) and (c) the object covered by cl. (a) read by itself cannot in my opinion be regarded as charitable."

Then, after referring to an affidavit which had been filed on behalf of the society explaining the meaning of the word "nucleus" in the expression "to form a nucleus of the universal brotherhood of humanity", LORD TOMLIN proceeded:

"I see no reason to think that this statement (though its admissibility as evidence is open to question) is not a fair and accurate statement of the purpose of the clause and the clause so regarded discloses in my opinion no charitable objects at all. But it is said that the three clauses should be read

(1) [1943] Ch. 435, n.

(2) [1943] 2 All E.R. 505; [1943] Ch. 422.

together, and so read should be construed so as to confine the object of cl. (a) to the formation of a body devoted exclusively to carrying out the objects indicated in cl. (b) and (c) respectively. I do not think the clauses can be so read. Each clause, in my opinion, expresses a distinct and independent object."

It may well be, as COHEN, J., said in *Re Price* (1), that the opinion of CLAUSON, J., that the second and third objects were charitable was undisturbed by anything which fell from LORD TOMLIN. The second object is clearly charitable, but it appears to us that it is far from clear that the third object is also charitable, and counsel for the rating authority was not prepared to concede that it was. Be that as it may (and we express no opinion in this judgment as to the third object in relation to s. 8, for we heard no argument on it), the decision of the House of Lords in *Re Macaulay's Estate* (2) with regard to the first object of the society precludes it from contending that it is "an organisation . . . whose main objects are charitable": nor did counsel for the plaintiff so contend before us. Accordingly, the society must rely on other grounds in order to bring itself within s. 8 of the Act, and the way in which it seeks to do so is by contending that its first main object is either concerned with the advancement of religion, or of education, or of social welfare, or is concerned with the advancement of all three. In order to succeed on any part of this argument, it is necessary, in our judgment, for the society to establish that (subject only to the principle *de minimis*) its main objects are exclusively concerned with the advancement of these three matters or with one or more of them; for, although an organisation's subsidiary objects may be concerned with something else, s. 8 does not apply, in our opinion, unless it be shown that its main objects are exclusively concerned with one or other of the specified purposes, or with all of them, as the case may be. On the other hand, the organisation need not, in our judgment, prove that its objects, when carried into effect, do, in fact, advance religion, etc., for it is sufficient to show that, being directed to that end, they may have that result: see *Re Price* (1), following *Thornton v. Howe* (3).

Before considering the society's arguments in further detail, it would be convenient at this point to examine the question of the relevance and admissibility of paras. 4 et seq. of the plaintiff's affidavit. These paragraphs are, in part, devoted to an explanation of what theosophy is, and of the meaning which theosophists attribute to the three main objects, and, in part, to a survey of what the international society and the English society have actually done. In our opinion, when an organisation or body has a written constitution, it is to that and to that alone to which the court should normally resort in order to ascertain its objects for the purpose of s. 8 of the Act; and, as LORD BUCKMASTER pointed out in *Re Macaulay's Estate* (2), unless an English word or phrase has, in relation to the organisation, a special meaning, evidence as to its meaning is not properly admissible. The House of Lords did not formally reject the affidavit which had been filed in *Re Macaulay's Estate* (2) explaining the word "nucleus" in the society's first object and we are willing to take note of what theosophy is and what theosophists believe, as stated by the plaintiff in her affidavit. It would, however, be going too far, in our opinion, to accept as admissible (in so far as it is directed to the question of construction) evidence of how theosophists explain the meaning of their objects. (Compare, for example, para. 5 of the affidavit, hereinafter mentioned.) The interpretation

(1) [1943] 2 All E.R. 505; [1943] Ch. 422.

(2) [1943] Ch. 435, n.

(3) (1862), 26 J.P. 774.

of the objects is a matter for the court and not for the members of the society.

There remains the plaintiff's account of the activities in which the society and its parent body have been engaged. Counsel for the plaintiff submitted before us that it is legitimate to look, not only to the language in which the society's main object is framed, but also to what the society has actually done; and, if, as he contended, the whole of its proved activities are confined to those specified in s. 8, its objects also ought to be regarded as so confined. He relied, in support of this suggestion, on the judgment of DEVLIN, J., in *Chartered Insurance Institute v. Corporation of London* (1). In that case the institute claimed the benefit of s. 8 of the Act in respect of its occupation of certain premises on the ground that its main objects were concerned with the advancement of education. The Divisional Court (LORD GODDARD, C.J., BYRNE and DEVLIN, JJ.), held that education was not the main object of the institute, and that, accordingly, the institute was not entitled to relief; but the learned judges followed somewhat different routes in arriving at that conclusion. The objects and purposes of the institute were set out in para. 2 of its charter and amounted to a considerable number. LORD GODDARD, C.J., in the course of his judgment said:

"To my mind, and the ground on which I propose to base my judgment, the question is one of interpretation of the charter. We have to look at the charter to find the main objects because the institute is a chartered body with a charter granted by the Sovereign, and its objects and scope are set out."

He then proceeded to consider several of the purposes specified in the charter and to examine whether each one was concerned, and, if so, to what extent, with the advancement of education. Having done so, LORD GODDARD, C.J., summarised the result by saying:

"The main object of this institution is to benefit the profession of insurance generally . . . The object of the institution is generally to raise the status and dignity of the profession."

That, in the view of LORD GODDARD, C.J., and notwithstanding the teaching and examinations which were involved, did not amount to education for the purposes of s. 8. BYRNE, J., agreed with LORD GODDARD, C.J., saying that on an examination of the charter it appeared to him to be plain that the main objects of the institute were more concerned with the advancement of members of the profession or occupation of insurance. DEVLIN, J., said:

"I have come to the same conclusion, but by a slightly different route, in which I place rather less reliance on the terms of the charter and more on the findings of fact in the Case. I agree, of course, that since what we have to ascertain under the section is whether this is a hereditament that is occupied for the purposes of an organisation whose main object is concerned with the advancement of education, the natural place to look in the first instance in order to see what are the objects of the institution is the charter. But in considering what is the main object I do not think that one can necessarily, as it were, count the different objects that are set out in the charter and see how many point to the advancement of education and how many point to such extraneous matters as disciplinary powers and the assistance of necessitous members, and so on. One must have regard to the

(1) 121 J.P. 482; [1957] 2 All E.R. 638.

way in which those objects have actually been achieved or attempted, and that is to be ascertained from the evidence that is set out in the Case."

The learned judge then observed (*ibid.*, at p. 643) that it was stated in the Case that some eighty per cent. of the work of the institute was devoted to tuition and examination activities rather than to the other matters which were set out in the later paragraphs of the charter; but he agreed with LORD GODDARD, C.J., and BYRNE, J., in thinking that that was not education of the kind which was envisaged by s. 8.

We do not think that the judgment of DEVLIN, J., at all assists the contention of counsel for the plaintiff that the interpretation of the society's objects can be assisted by resort to the operations in which the society has indulged. In our opinion, DEVLIN, J., was saying no more than that, when an organisation has several objects specified in its written constitution, as was the case with the Chartered Insurance Institute, its activities are relevant to an inquiry as to what should, for the purposes of s. 8, be regarded as its main objects. We do not think that the learned judge was intending to go further than that, and, if such was his view, we cannot see that it is open to any criticism. That, however, is a very different thing from saying that, where there is no doubt what the main objects of a body are (and there is no doubt in the present case), evidence of what its activities have been may be received either in order to construe the language by which the objects are described or to limit the proper construction of the language by reference to the activities. In our judgment, no such evidence is admissible for either of those purposes.

Having regard, then, to the language of the first of the society's objects, and not disregarding the plaintiff's explanation of what theosophy is and what theosophists believe, the question arises whether that object is, in whole or in part, concerned with the advancement of religion. That it is not wholly so concerned would seem to follow from the decision of the House of Lords in *Re Macaulay's Estate* (1); for a purpose which is solely concerned with the advancement of religion could hardly fail to be charitable, which the House held that object (i) was not. If it be objected that the words "or . . . otherwise" in s. 8 show that some private aspect of religion was in contemplation, we agree with the learned judge in thinking that no question of any such private element is shown in the present case. Is then the object concerned in part with the advancement of religion? So far as material to this question, object (i) reads: "To form a nucleus of the universal brotherhood of humanity, without distinction of . . . creed . . .". In para. 4 of her affidavit the plaintiff says:

"Theosophy is the study of the truths which form the basis of all religions and which cannot be claimed as the exclusive possession of any one religion. Theosophists believe that the divine life of God is the source of, is present in, and progressively manifests itself in, all the kingdoms of nature and the supernatural kingdoms. Theosophy as a religion teaches the Fatherhood of God and the recognition of the corresponding brotherhood of humanity; as a philosophy it teaches how the divine life of God progressively manifests itself; and as a science it teaches how this process occurs, the laws which govern it and how human beings can hasten it."

In *United Grand Lodge of Ancient Free and Accepted Masons of England v. Holborn Borough Council* (2), DONOVAN, J., in delivering the judgment of the Divisional Court, said:

(1) [1943] Ch. 435, n.

(2) 121 J.P. 595; [1957] 3 All E.R. 281.

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"To advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary. There is nothing comparable to that in Masonry . . . There is no religious instruction, no programme for the persuasion of unbelievers, no religious supervision to see that its members remain active and constant in the various religions they may profess, no holding of religious services, no pastoral or missionary work of any kind."

What the Divisional Court said of Masonry can substantially, if not equally, be said, so far as we can see, of theosophy. But, further than that, the teaching of the Fatherhood of God and the recognition of the corresponding brotherhood of humanity without distinction of creed appears to us to be, at best, the teaching of a doctrine which is of a philosophical or metaphysical conception rather than the advancement of religion. If the society is concerned in the advancement of religion, it may well be asked, "What religion does the society advance and how does it advance it?" We can find no satisfactory answer to this question in the language of object (i) or in any of the relevant evidence. In our opinion, it cannot be said that this object is in any way concerned with the advancement of religion.

Nor can we find that the object is in any way concerned with the advancement of education. In the course of his judgment in *Chartered Insurance Institute v. Corporation of London* (1), DEVLIN, J., said:

"I think that the advancement of education means the advancement of education for its own sake in order that the mind may be trained. It may be that it is unnecessary that that should be general education—I accept for the purposes of the present case that education in a particular subject is sufficient—but the main object must be the advancement of education in the sense of the training of the mind."

We agree with those observations of the learned judge. The only teaching which, on the material before us, is involved in the first of the society's objects is the teaching of the theosophical doctrine itself; and that cannot, in our judgment, be regarded as education in the sense to which DEVLIN, J., referred.

If, then, the society is unable to show that its first object is concerned with the advancement of religion or education, it can only succeed in this appeal if it establishes that its first object is wholly concerned with the advancement of social welfare. This aspect of s. 8 was considered by this court in *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* (2). The facts of that case had little in common with those in the present case and it is unnecessary therefore to state them. Certain points do, however, emerge from the judgment of the court. (i) *Prima facie*, the expression "social welfare" means the well-being (whether in the physical, mental or material sense) of individuals as members of society. (ii) The provision of benefits which tend directly to improve the health or conditions of life of individuals comes *prima facie* within the expression "social welfare". (iii) The expression does not necessarily involve the presence of an eleemosynary element. (iv) In order to qualify

(1) 121 J.P. 482; [1957] 2 All E.R. 638.

(2) 121 J.P. 567; [1957] 3 All E.R. 199.

under this part of the section, an organisation must have as its object the advancement of social welfare as an end in itself or for its own sake; and, although "concerned" is a wide word, it cannot be read as bringing in as an object something which is incidental. (v) The persons to be benefited and the source of the benefits are pertinent considerations. (vi) Inasmuch as the provision in question is an exemption from rates at the expense of the general body of ratepayers, it would be right, in a doubtful case, to give the words "or otherwise concerned with the advancement of . . . social welfare" a restricted meaning. It is quite clear that the court was not attempting an exhaustive or precise definition of these words. It was indicating in a general way what, in its view, they mean and prescribing tests which might usefully be applied to the facts of any given case. The reference in the judgment to welfare denoting a state of "being well, whether in the physical, mental or material sense" was not intended necessarily to exclude the idea of well-being in a spiritual or emotional sense, for example, happiness or ethical behaviour. Nor did the court, in our judgment, when referring to "the provision of benefits which tends directly to improve the health or conditions of life of individuals", mean that the provision of benefits which tended indirectly to produce those results cannot qualify under the section; for example, it might well be that an organisation the main object of which was concerned with the free training of girls who desired to take up nursing or midwifery as a profession would qualify notwithstanding that there was no direct benefit to society during their period of training. We venture to make these observations because a somewhat too rigid approach to the judgment in *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* (1) seemed to be manifested in some of the arguments which were addressed to us.

Turning now to object (i) of the Theosophical Society, one is struck not only by its width, but also by its vagueness and uncertainty, even when read in the light of the plaintiff's affidavit. In order to enable the society to succeed, it would, in effect, be necessary to construe the relevant words in s. 8 (1) (a) as including any non-charitable body which benefits the community, or a part of it, in any way, and it is clear, both from the language of the section itself and from the judgment of this court to which we have referred, that the words cannot be so construed. The implementation of the belief (referred to in para. 5 of the plaintiff's affidavit) "in working for the diminution and final abolition of all intolerance and discrimination in relation to race, creed, sex, social class and colour" is clearly within the scope of the society's first object. Equally clearly, some at least of those activities are far removed from any conception of "social welfare" that can reasonably or legitimately be entertained. It is not enough for the society to establish that in some, or even in many, ways certain members of the community may be benefited, directly or indirectly, by the practice and propagation of its ideology. Even assuming that that is so (and we express no opinion about it, one way or the other), the scope of the society's first object is so wide that many activities lie within it which do not promote the welfare of the community in a social sense at all. In dealing with this part of the case, WYNN-PARRY, J., said that object (i)

"... would justify operations which could not by any stretch of the imagination be considered as within the phrase 'social welfare', however wide a construction were reasonably placed on that phrase."

(1) 121 J.P. 567; [1957] 3 All E.R. 199.

In that view we respectfully and entirely concur.

The conclusion, accordingly, at which we have arrived is that at least one of the main objects of the society is neither charitable nor otherwise concerned with the advancement of religion, education or social welfare, for it is concerned also with many other matters as well. From this it follows that the society does not bring itself within s. 8 of the Act and that the plaintiff's appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, for *Berry & Berry*, Tunbridge Wells; *Sharpe, Pritchard & Co.*

F.G.

COURT OF APPEAL

LORD EVERSHERD, M.R., ROMER AND ORMEROD, L.JJ.)

November 11, 12, 26, 1957

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES v. ST. MARYLEBONE CORPORATION

Rating—Relief—Meaning of "organisation . . . concerned with the advancement of . . . social welfare"—General Nursing Council for England and Wales—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

The General Nursing Council for England and Wales was originally formed under the repealed Nurses Registration Act, 1919, and is now regulated by the Nurses Act, 1957. Under the provisions of that Act the purposes and functions of the council are to maintain a register of nurses and a roll of assistant nurses, to regulate the admission to and removal from the register and the roll, and to exercise supervisory and directing powers in regard to training and examination. Penalties were provided for the false assumption of the title of registered or enrolled nurse, and restrictions were provided on the use of the title of nurse and assistant nurse. It was common ground that the council was not established or conducted for profit. The question was whether the council was an organisation the main objects of which were concerned with the advancement of social welfare within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

HELD: the main objects of the council were the enhancement of the qualities and status of nurses and the benefit and protection of the public, particularly of the sick, which achievements were essentially inseparable, but the improvement in quality and prestige of the nursing profession was not an object concerned with social welfare within the meaning of s. 8 (1) (a) of the Act of 1955, and, therefore, the council was not entitled to the relief thereunder.

PER CURIAM: The advancement of social welfare ought not to be equated with the promotion, generally, of the well-being, in every sense and of every kind, of society or sections of society. Everything which can be shown to tend to the public advantage cannot for the purpose of s. 8 (1) (a) of the Act of 1955 be treated as concerned with the advancement of social welfare.

APPEAL by the defendant, St. Marylebone Corporation, from a decision of DANCKWERTS, J., reported 121 J.P. 497, that the plaintiffs were such an organisation as was mentioned in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because their main objects were concerned with the advancement of social welfare.

Cross, Q.C., and *J. L. Arnold* for the defendant, the rating authority.

Squibb, Q.C., and *W. L. Roots* for the plaintiffs, the ratepayers.

Cur. adv. vult.

Nov. 26. **LORD EVERSHERD, M.R.**, read the following judgment of the court: In this case (which, like the immediately preceding case, *Berry v. St. Marylebone Corpn.* (ante, p. 59), arises on an application by originating summons to the Chancery Division of the High Court) the General Nursing Council for England and Wales seek and have obtained a declaration that they are an organisation such as is mentioned in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and are accordingly entitled to the benefit of that section in respect of the hereditament occupied by them for the purposes of their statutory functions at Nos. 23 to 25, Portland Place in London. In this case, as in the last, it is not in doubt that the council are an organisation not established or conducted for profit. But, having regard to the decision of this court in *General Medical Council v. Inland Revenue Comrs.*, *English Branch Council of General Medical Council v. Inland Revenue Comrs.* (1), and to the decision of the Scottish Court of Session in *General Nursing Council for Scotland v. Inland Revenue Comrs.* (2), it has not been contended before us that the council can be regarded (at any rate in this court) as an organisation whose main objects are charitable, or as an organisation whose main objects are otherwise concerned with the advancement of education. The sole question is whether the council are, within the meaning of the section, an organisation whose main objects, not being charitable, are "concerned with the advancement of . . . social welfare". **DANCKWERTS, J.**, came to the conclusion that they were. He said:

"They [the council] were not established for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose of social welfare."

Although the council were first established by the Nurses Registration Act, 1919, it was agreed before us, as before **DANCKWERTS, J.**, that the Nurses Act, 1957 (which, inter alia, repealed and re-enacted the earlier statute) could be taken as accurately specifying and containing the purposes and functions laid by Parliament on the council. From this source, therefore, must be discovered (with the guidance to be obtained from the two cases already mentioned, *General Medical Council v. Inland Revenue Comrs.* (1) and *General Nursing Council for Scotland v. Inland Revenue Comrs.* (2)), the answer to the first essential question: What are the "main objects" of the council? **DANCKWERTS, J.**, has summarised in his judgment all the provisions of the Act of 1957, and we do not need to repeat them in detail. It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and duties as are ancillary to and consequent on the foregoing. The income of the council appears to be derived, in part, from fees which the council are authorised to charge on applications for examination and registration or enrolment and the like, and, as to the rest, from moneys directly or indirectly provided by Parliament. Our attention was not, during the argument, directed to any

(1) (1928), 97 L.J.K.B. 578.

(2) 1929 S.C. 664.

figures showing the actual income or expenditure in any year of the council, from which we assume that those figures do not assist towards a solution of the problem before the court. It should be added that, by the terms of the Act, only those persons whose names are on the council's register are entitled to call themselves "nurses" or to wear the appropriate and distinctive uniform of nurses.

In *General Medical Council v. Inland Revenue Comrs.* (1) it was, of course, necessary for the General Medical Council, in order to succeed, to show that they were established "for charitable purposes only"; and that (in the view of this court) in spite of the educational and benevolent character of many of their purposes, they could not succeed in doing. The judgment of LORD HANWORTH, M.R., was, we think, less positive in this respect, although there is no doubt that both SARGANT, L.J., and LAWRENCE, L.J., were clearly of opinion that the real scheme and purpose of the relevant legislation

"is to regulate the profession of medical men, who in consequence have certain privileges conferred upon them by the legislation, and that it is in the first instance as a professional measure that the legislation is to be regarded."

See per SARGANT, L.J. Thus, in the view of the majority (at any rate) of the court, the public benefit and advantage which unquestionably resulted from the regulation of the medical profession should be regarded as of secondary significance.

When the case of the General Nursing Council for Scotland came before the Court of Session, there is no doubt that the learned judges were more sympathetic to that body than had been the English Court of Appeal to the General Medical Council; and it was and is a point of distinction between the Medical Council, on the one hand, and the two Nursing Councils, on the other, that in the former case material benefits are conferred by registration exceeding anything to be found in the cases of the Nursing Councils—particularly the provision that only registered doctors can sue for and recover their fees. Nevertheless, the Inner House concluded in the end that the case before them could not be satisfactorily distinguished from *General Medical Council v. Inland Revenue Comrs.* (1). In the course of his leading judgment, LORD SANDS said:

"The sole purpose of the council is to form and maintain a register for qualified nurses, and its chief work is dealing with applications for admission to the register."

Then, after considering the nature of this "chief work", LORD SANDS concluded that, if it constituted the entire scope of the council's operations, it would be educational and, therefore, charitable. He went on to say:

"Has this council any other purposes? I take it that it is regarded as being in the interest of the sick . . . that there should be in this country a body of nurses of undoubted efficiency, and of full and adequate training as attested by a responsible body. The system is designed to protect the public, and to raise the standard of nursing generally in the interests of the community and in particular of the sick."

LORD SANDS then proceeded to consider whether there was still some other purpose which had the result of disabling the council from making good their claim to establishment for charitable purposes *only*, and in the passage which is recited and relied on by DANCKWERTS, J., but which we do not here repeat,

LORD SANDS concluded that the professional cachet which registration confers on the nurses ought not, in his view, to have the effect of requiring the Act by which the council were established to be interpreted as one designed in the professional interest of the nurses and not as one established in the general public interest. Nevertheless, in the end, LORD SANDS found it impossible—whatever might have been his view had the question been entirely novel—to distinguish the case from *General Medical Council v. Inland Revenue Comrs.* (1). He said:

"No doubt in that case the professional benefits were greater and of a somewhat different quality, but I do not think that this can affect the matter, so long as the professional benefits, as in the present case, are not intangible."

To the same effect were the judgments of LORD BLACKBURN and LORD MORISON; and, although the Lord President, LORD CLYDE, would clearly, for his own part, have distinguished the case from *General Medical Council v. Inland Revenue Comrs.* (1), in the end he did not dissent from his brethren. We add one citation from the judgment of LORD MORISON:

"In my view, the reasoning in these decisions [*General Medical Council v. Inland Revenue Comrs.* (1) and one other] applies to the present case. The statute here is not described as an Act for the education of nurses . . . In establishing the register the purpose of the statute is to secure that the vocation of nurse shall be regulated. It enables nurses to obtain a definite qualification, if their abilities and training equip them sufficiently to attain a definite standard."

It is not perhaps entirely easy to say how far the learned judges of the Court of Session intended to go in finally deciding, as they did, that *General Nursing Council for Scotland v. Inland Revenue Comrs.* (2) could not be distinguished from *General Medical Council v. Inland Revenue Comrs.* (1). In view of the opinions which they appear to have entertained, it is difficult to suppose that they intended to hold that the whole scheme of the nursing legislation was to regulate the profession of nurses and that, as SARGANT, L.J., said in the earlier case:

"... it is in the first instance as a professional measure that the legislation is to be regarded."

It was, we think, not necessary for the Scottish court to go so far. We think it is sufficient, but also necessary, to say that the decision of that court depended on the view to which they felt in the end compelled, that the professional purposes of the legislation, and the professional benefits for nurses in the way of enhanced status and prestige which the legislation was designed to confer, could not be regarded as merely ancillary to the benefit intended to be provided for the public or for a section of it, namely, the sick. It has not been suggested that there is any difference as regards main objects between the General Nursing Council for England and Wales and the General Nursing Council for Scotland: each is a counterpart of the other. It follows, therefore, in our judgment, that we ought to treat the conclusion of the Scottish Court of Session as strongly guiding, if not governing, our own conclusion. We add, indeed, that for our part we respectfully do not think that it would be possible to take, for present purposes, a view more favourable to the Nursing Council than that formed by the Scottish judges. In the result, it seems to us that the view which DANKWERTS, J., formed as to the main objects of the council ought not to be supported if by his language, cited

(1) (1928), 97 L.J.K.B. 578.

(2) 1929 S.C. 664.

previously, he intended to infer that what we may call the professional aspect of the legislation was of merely secondary or ancillary significance.

In truth, however, it may not be useful or even possible to try to give a primacy to the one purpose rather than to the other; and all the more, perhaps, should the attempt be abandoned in the present case, where the statute speaks of "main objects" in the plural. As observed in the Scottish court, the chief duty and function of the council is the formation and maintenance of the register of nurses. The results were and were intended to be, on the one hand, the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. The two achievements are essentially inseparable. The public are benefited because the nursing profession is improved and its status enhanced. The profession of nursing is improved in quality and prestige because and to the extent that the public are benefited and safeguarded.

If, then, the main objects of the council cannot be confined to securing or promoting the benefit of the public or the ailing section of the public, can it be said that those main objects are "concerned with the advancement of . . . social welfare"? We attach, in the circumstances of the present case, particular importance to the words "concerned with"; and we agree with counsel for the rating authority that it is not sufficient if the main objects are somehow or other related to, in some sense connected or "mixed up with", the advancement of social welfare. In our judgment, the advancement of social welfare (in this case) or of religion or education or of all or some of those activities (in other cases) must be "the concern of" the main objects; in other words, it must in the present case be established that the main objects, which we have, we hope, sufficiently now defined, are directed to the advancement of social welfare. Unless the words are so interpreted, the whole phrase in s. 8 (1) (a) of the Act of 1955 is given, as it seems to us, a scope so vague and embracing that every non-profit making activity, some aspect of which could be said to tend to the promotion of social welfare, would be brought within the section—a result which, in our judgment, Parliament cannot have contemplated. If we are right so far, then, applying as best we can the tests of common sense and of the common usage of our language, but without any attempt at defining the term "social welfare", we would answer in the negative the question: Are the main objects of the council directed to the advancement of social welfare? In the first place, we cannot, with all respect to DANCKWERTS, J., agree that every organisation "established for the purpose of benefiting the public" should be treated as one the main objects of which are concerned with the advancement of social welfare: on the ground that, since "welfare" is synonymous with well-being, therefore social welfare and public benefit must mean and are the same thing. On this view, it would seem to follow that every statutory or other scheme for regulating any professional body would prima facie qualify within the section. As SARGANT, L.J., observed in *General Medical Council v. Inland Revenue Comrs.* (1), the proper regulation of the professions of the law or of any other scientific profession must indubitably be for the public benefit, since those sections of the public who required the assistance of lawyers or, for example, accountants would thereby be safeguarded and assisted. Moreover, so wide a significance attributed to the words "social welfare" would make the earlier reference to the advancement of education wholly otiose. Further, such a view appears to us inconsistent with the reasoning of this court as expressed in the judgment of PARKER, L.J., in *National Deposit Friendly*

(1) (1928), 97 L.L.K.B. 578.

Society (Trustees) v. Skegness Urban District Council (1), and with the restriction which, according to that judgment, has to be applied to the wide and vague meaning which the phrase "social welfare" might otherwise bear.

It was contended, however, that, whatever be the intended scope and limits of "social welfare", provision for the health of individual members of the community is, undoubtedly, comprehended among the characteristics and obligations of what is called the welfare state; that the provision of competent nurses is an essential part of every health service; and, accordingly, that the council's concern with the nursing profession is sufficient qualification within the meaning of the section. Although the argument is both formidable and attractive, it is not, in our judgment, sufficient. The answer to it is, in our view, provided by the conclusion which we have already expressed that it is not enough that the objects of the organisation are in some degree related to the advancement of social welfare: they must in a real sense be directed to it. It is, no doubt, perfectly true that some part, at least, of the work of some nurses is properly described as social welfare work, however that phrase be defined; but it must equally be true, in our judgment, that other parts of nurses' work could not fairly be so described. A nurse engaged by a private person of means, to live in his or her house and tend to his or her medical requirements, could not, in our view, be sensibly referred to as performing work of social welfare. The link can, no doubt, be seen; but it is, in our judgment, too remote.

An argument was presented to us on the authority of *Inland Revenue Comrs. v. Baddeley* (2), a decision of the House of Lords. The question in that case largely turned on the construction of the words "religious" (or "moral") "social and physical well-being". This court had felt able to give to this phrase a restricted sense sufficient to make the objects of the trust charitable; but the House rejected that view. VISCOUNT SIMONDS said:

"... I do not think it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word 'social'. On the contrary, I find in its use confirmation of the impression that the whole provision makes on me, that its purpose is to establish what is well enough called a community centre..."

To the like effect was the speech of LORD TUCKER, who observed that the phrase, "the promotion of social well-being,"

"... would appear to cover many of the activities of the so-called 'welfare state', and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable."

So in the present case it was said that, since "welfare" meant no more and no less than "well-being", social welfare was a phrase so comprehensive as to include (at least) the intended and inevitable results and achievements of the Nursing Council.

Our answer to this argument is, first, that the phrase with which we are here concerned is, after all, "social welfare" and not "social well-being". That, of itself, no doubt, does not take the matter very far, particularly in view of the speeches in *Inland Revenue Comrs. v. Baddeley* (2) and of the conclusion of this court in *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* (1) that the words "welfare" and "well-being" prima facie

(1) 121 J.P. 567; [1957] 3 All E.R. 199.

(2) [1955] 1 All E.R. 525; [1955] A.C. 672.

Eng. Per.

mean the same thing. But the phrase "social welfare" in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, appears in a context: a context in which it is preceded by the words, among others, "advancement of . . . education"; and those words, for reasons which we have already given, must, we think, limit inevitably, and give some degree of precision to, what might otherwise be merely vague and all-comprehending. Then, further, the phrase "social welfare" has, in our judgment, now acquired a meaning which, however difficult of definition, has at least something in it of the characteristics of a term of art. In such a sense it is used, for example, in the Miners' Welfare Act, 1952, *Berry v. St. Marylebone Corp'n.* (ante, p. 59); and the phrase which we are concerned to construe is repeated in s. 12 (7) (b) of the Copyright Act, 1956. In so repeating it, Parliament must, at least, have assumed a certain precision of meaning, even if it has not seen fit to offer any clues for the guidance of the judges.

In *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council* (1), this court forebore from attempting a definition, and we do not propose to neglect that example. The most that the court can do—as the court did in *National Deposit Friendly Society v. Skegness Urban District Council* (1)—is to say whether in its judgment a particular case does or does not come within the section, and in so doing so apply, as best it can, the ordinary standards of common sense and language. So far as is necessary or relevant to the performance of that duty, the court may say that certain characteristics are or are not to be discerned in the conception of social welfare. In the judgment of the court in the preceding case, reference was made to certain points which emerge from this court's judgment in *National Deposit Friendly Society v. Skegness Urban District Council* (1), including the necessity of imposing some limitation on what otherwise might be the extreme vagueness of the language used by Parliament. One ground for such limitation was the circumstance that the relevant provision in the Act confers an exemption from rates at the expense of the general body of ratepayers. Additional grounds may be found in the following passage from the judgment:

"It is, we think, in considering this question that the persons to be benefited and the source of the benefits become pertinent considerations. Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions, it may well be difficult to say that the object is the advancement of social welfare for its own sake even though the benefits themselves may advance the well-being of the individual members. It is true that the question is whether the object is one 'concerned' with the advancement of social welfare, but though 'concerned' is a wide word, we do not think that it can be read as bringing in as an object something which is incidental."

We have tried to apply such considerations to the solution of the case of the Nursing Council; and, so applying them, have come to the conclusion that their main objects are not shown to be "concerned with the advancement of . . . social welfare". We have, we hope, in the course of this judgment, at least indicated with sufficient clearness, even if without much precision, why we think so. In such a case, as LORD RADCLIFFE observed in a wholly different context, the law cannot be set at rest by any neat combination of words. But, if we can add anything to illustrate the limitation which, we think, should in this context be put on social welfare, it would be that the phrase involves at any rate the

UNIV. OF MICH. (1) 121 J.P. 567; [1957] 3 All E.R. 199.

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conception of what used to be called "good works": the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate. We suggest this, not by way of definition, but only as an indication why, in our judgment, the advancement of social welfare ought not to be equated with the promotion, generally, of the well-being, in every sense and of every kind, of society or sections of society; why, therefore, everything which can be shown to tend to the public advantage cannot, for the purposes of the section, be treated as concerned with the advancement of social welfare; and why, more particularly, the General Nursing Council cannot succeed in bringing themselves within s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. In our judgment, the appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.; Pontifex, Pitt & Co.*

F.G.

COURT OF APPEAL

(LORD EVERSHERD, M.R., ROMER AND ORMEROD, L.JJ.)

November 13, 14, 26, 1957

DERBYSHIRE MINERS' WELFARE COMMITTEE *v.* SKEGNESS U.D.C.

Rating—Relief—Organisation concerned with advancement of social welfare—Mine workers' holiday camp—Compulsory contributions levied under statute—Element of benevolence—Class sufficiently wide—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

The ratepayers were the trustees of a holiday camp and ancillary premises which they occupied for the purpose of providing "a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district," including the workers' dependants and guests. The camp was established under a fund raised by compulsory contributions levied under certain Acts. The ratepayers were responsible for maintenance and operational expenses in connexion with the camp, but received grants to cover capital expenditure from a social welfare organisation set up under statute. The ratepayers paid less than a rack rent for the premises, they did not seek to make a profit, and they did not make a loss on their operations. The employees of collieries benefiting under the trust were all now employed by the National Coal Board. The question for the court was whether the ratepayers were an organisation whose main objects were "concerned with the advancement of social welfare" within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, so as to entitle them to have their rate limited to the amount levied in the previous year under s. 8 (2).

HELD: the ratepayers were entitled to the relief claimed because the object of providing a holiday camp of the kind in question was "concerned with the advancement of social welfare" and the coalminers benefiting constituted a sufficiently large and important section of the community for the purpose of s. 8 (1) (a) of the Act.

APPEAL by the local authority, the Skegness Urban District Council, from a decision of the Divisional Court reported 121 J.P. 385.

The Divisional Court allowed the appeal of the ratepayers by way of Case Stated in respect of an adjudication of the Lincoln (Parts of Lindsey) Quarter Sessions, holding that the ratepayers were an organisation concerned with the advancement of social welfare, and, therefore, entitled to the relief provided by

s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The local authority appealed to the Court of Appeal.

Sir Arthur Comyns Carr, Q.C., Scholefield and J. D. James for the local authority.

Cross, Q.C., and J. Malcolm Milne for the ratepayers.

Cur. adv. vult.

Nov. 26. **ORMEROD, L.J.**, read the following judgment of the court. This is an appeal by the Skegness Urban District Council from a decision of the Divisional Court of May 9, 1957, allowing the appeal of the Derbyshire Miners' Welfare Committee by way of Case Stated from Lincoln (Parts of Lindsey) Quarter Sessions. The Divisional Court held that the respondents were entitled to relief under s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

It is necessary in the first place to set out shortly the various statutory instruments and their provisions by reason of which the respondent committee came into existence and carried out its various objects. Section 20 of the Mining Industry Act, 1920, provided for the setting up of a compulsory levy on every ton of coal mined. This was payable by the mining owners and provision was made for setting up a national committee with the necessary branch committees to administer the fund for the benefit of miners in general. By the Mining Industry Act, 1926, s. 14, provision was made for a further levy, this time on the royalty owners, to be applied for similar purposes. It is to be noted that there was never any voluntary contribution to the fund. In 1938 the royalties were nationalised and a commission was established to administer them, which commission remained liable to pay the royalty levy. In 1947 the colliery undertakings were nationalised, and the royalties were handed over to the National Coal Board, which became liable to pay the 1920 levy and the royalty levy. In 1952 the Miners' Welfare Act, 1952, was passed, s. 2 of which provided that the miners' welfare fund constituted under s. 20 of the Mining Industry Act, 1920, should be wound up and the assets transferred as to "colliery welfare property" to the National Coal Board and as to other properties to the Social Welfare Organisation, which was defined by s. 12 to mean the

"Coal Industry Social Welfare Organisation incorporated under the Companies Act, 1948."

Section 13 of the Act of 1952 provided that the board should from time to time pay to the Social Welfare Organisation sums necessary to meet the estimated costs of social welfare activities, which were defined by s. 16 as meaning

"activities concerned with the maintenance or improvement of the health, social well-being, recreation or conditions of living of—(a) persons employed in or about coal mines . . . (c) dependants of any such persons . . ."

By a lease dated Dec. 6, 1940, made between the trustees on behalf of the Derbyshire District Miners' Welfare Committee of the one part and the trustees of the Derbyshire District Miners' Holiday Centre of the other part, the lessors demised to the lessees, the present respondents, a piece of land, together with the buildings thereon, at Seathorne, Skegness, for a term of twenty-one years at a yearly rent of £200. The lease contained a recital that the miners' welfare committee had, on the recommendation of the district committee, allocated the sum of £35,000 for the provision of a holiday centre for the use and benefit of workers in or about coal mines, particularly those resident in the Derbyshire district, and that the lessees had been appointed to administer the fund in

accordance with the trusts declared in the lease. Clause 6 of the lease provided, *inter alia*, that the lessees should permit the demised premises to be used as a holiday centre and recreation and pleasure ground for the benefit of workers in or about coal mines employed in the Derbyshire district, including their dependants and invitees. Clause 9 provided that they should assess the payments from persons using the accommodation, facilities and benefits at a figure estimated to produce such a surplus on the running costs as would provide a sufficient reserve for depreciation of the trust property and for the cost of necessary repairs and renewals. It is to be noted that the trust created by the lease was the subject of an order made by the Charity Commission on Feb. 20, 1950. Doubts have been raised as to the validity of this order and it was agreed by counsel on both sides that, for the purposes of this appeal, the powers vested in the respondents were those contained in the lease.

According to the Case Stated, after finding that the respondents had at all material times occupied the hereditament for the purpose of a holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire) and setting out a description of the premises comprising the hereditament, quarter sessions found that the camp was provided by the Social Welfare Organisation and was being run by the respondents, who sought to make neither a profit nor a loss in their operations. The Case further set out as follows:

"(viii). That the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields. (ix) That generally there were no vacancies left to be filled by applicants from other coal fields. (x) That a charge varying from £5 15s. for an adult to £1 10s. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness (xi) That drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club. A substantial profit was made out of the supply of drink, but the charge for accommodation was so fixed that, taking all the operations together, the trustees made neither a profit nor a loss."

Quarter sessions were of opinion (a) that the provision of the holiday home for North Derbyshire miners was not a charitable object in the absence of the element of poverty or ill health, and (b) the purposes of the trust

"were not otherwise concerned with the advancement of social welfare, because social welfare connotes a benefit to the community and not a benefit to an individual or to a particular class of work-people employed by one employer."

They were consequently of the opinion that the occupiers were not entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and dismissed the appeal. This decision was reversed by the Divisional Court. It was not contended that the object was a charitable one.

It would appear that the questions to be answered in this appeal are: (i) Is the object of providing a holiday camp of this nature one which can be said to be "concerned with the advancement of social welfare?" and (ii) If so, is the class of persons entitled to benefit under the scheme sufficiently wide to bring it within the provisions of the section? It has not been contended that the provision of the camp is other than the main object of the scheme or that the trust was established

or conducted for profit. Unless, therefore, either of these questions can be answered in the negative, this appeal must fail. Counsel for the appellants puts his case in three ways. He says in the first place that the provision of the camp cannot be regarded as social welfare, because (a) the funds, so far as they are not provided by the beneficiaries themselves, are provided by a statutory levy and not by voluntary contributions, and (b) the carrying on of the camp is a business of which the outgoings are to an overwhelming extent paid by the beneficiaries themselves. As to (a), it is, of course, true that the sum of £35,000, which was originally provided for the establishment of the camp, and, as far as the evidence shows, is the only sum which has been provided, came from the miners' welfare fund, which was raised by means of a compulsory levy. It is difficult to see why this should make any difference. The matter to be considered is the purpose for which the funds were provided. If they were provided for a purpose which can properly be described as the advancement of social welfare, then we fail to see why it should matter whether they were provided voluntarily or under some statutory or other compulsion. The appellants sought to derive some support for their contention from the judgment of PARKER, L.J., in *National Deposit Friendly Society (Trustees) v. Urban District Council* (1), where he says:

"It is, we think, in considering this question [the restriction of the meaning of social welfare in its widest sense] that the persons to be benefited and the source of the benefits become pertinent considerations."

But the next sentence in the judgment,

"Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions . . ."

shows clearly why the source of the benefits had there become a pertinent consideration.

With regard to (b), the appellants again relied on the decision in the *National Deposit* case (1). It was argued that to an overwhelming degree the expenses of the camp were paid by those who enjoyed its benefits. Apart from the services rendered by the trustees, and in the absence of evidence to the contrary, it is to be presumed that they were given without payment, the only benefit from the welfare fund was derived from the fact that the rent was only £200 per annum. How much this was below an economic rent of the premises was indicated by the assessment of the rateable value of the hereditaments at £3,800. No figures showing the cost of running the camp were produced either to us or to the Divisional Court, but it was argued that the advantage derived from the reduced rent when related to the total outgoings was too small to be a relevant consideration. In those circumstances, it was submitted that the case could not be distinguished from the *National Deposit* case (1), a case of a friendly society supported entirely by the contributions of its members who received benefits on the happening of various contingencies calculated according to the amounts of their respective contributions. The distinction between the two cases is, in our judgment, clear. On the one hand, there is a friendly society carrying on what is in effect the business of a mutual insurance company. On the other hand, there is a committee carrying on a holiday camp on premises which have been provided otherwise than by those entitled to benefit at a cost of £35,000 so that holidays may be enjoyed at a cost not greater than that of running the camp and providing for the upkeep. It can hardly be denied that a holiday camp such as this tends to promote the happiness and general well-being of those entitled to make use of it, and it is unnecessary to attempt any precise definition in order to come to the conclusion

(1) 121 J.P. 567; [1957] 3 All E.R. 199.

that the object of providing this camp is one concerned with "social welfare". Some support for this view, although not necessarily conclusive, is given by the definition of "social welfare activities" contained in s. 16 of the Miners' Welfare Act, 1952, to which reference has already been made.

The appellants' second submission was that, even if the provision of the holiday camp was to be regarded as concerned with social welfare, the object of providing it could not be regarded as the "advancement of social welfare". Counsel for the appellants based his argument on the analogy that the co-operative butcher "provided" meat, but did not in any way "advance" it, as might a body concerned with agricultural research, and that "advancement" as used in this section must connote an element of propaganda or some similar element rather than the mere provision of benefits. It may well be that the provision of food or other commodities by a tradesman may not come within the meaning of advancement, but the provision of an amenity such as this one is on a very different footing and this holiday camp by its very existence can be said to "advance" social welfare by improving the lot of those persons entitled to take advantage of it. As we see it, therefore, the first question must be answered in the affirmative. The provision of a holiday camp of this nature is one which can be said to be "concerned with the advancement of social welfare".

The second question (that is, whether the class of persons entitled to benefit is wide enough to bring the object within the section) was the subject of the appellants' third submission. According to the Case Stated, the opinion of quarter sessions was that it was not so wide, because, to quote from the findings in the Case,

"social welfare connotes a benefit to the community and not a benefit to an individual or to a particular class of work-people employed by one employer."

It would appear that the opinion of quarter sessions on this question was based on the rule in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (1), where it was held that a settlement directing trustees to apply certain income "in providing for . . . the education of children of employees or former employees of" a British limited company "or any of its subsidiary or allied companies" did not satisfy the test of public benefit requisite to establish it as charitable, even though the employees so indicated numbered over a hundred thousand, the nexus between the persons in the group being employment by particular employers. It is to be noted that the question then being decided was whether the trust was charitable, a consideration which does not arise in the present case, and LORD SIMONDS in his speech (*ibid.*, at p. 35) leaves open a case such as this, where the persons entitled to benefit are employees in a nationalised industry.

If the view taken by quarter sessions is correct, it would mean that no scheme for the benefit of miners which would otherwise be for the advancement of social welfare could come within the section, even though the persons entitled to benefit constituted the whole of the persons employed in the mining industry. We cannot accept that view as the correct one. Each case must be decided on its own facts, the question being whether the persons to be benefited form a sufficiently substantial part of the community, measured by common-sense standards, to fulfil the implication of the word "social" as used in the section. DONOVAN, J., in his judgment in the Divisional Court, said:

"For my part, I think that the coal miners of Derbyshire, their dependants

and their invitees, if they are the only beneficiaries of this scheme, do constitute a sufficiently large and important section of the community for the present purpose."

We agree with the view there expressed.

It was argued on behalf of the respondents that the question was one of fact, and that the finding of quarter sessions was in their favour. Reference has already been made to the words used by quarter sessions in coming to their decision on this part of the case. It is true that they found that

"to confer a benefit on some of the servants of the National Coal Board by the provision of a summer holiday at cost is not sufficiently wide to constitute the advancement of social welfare."

That finding must be read with the preceding sentence where the opinion was expressed that "social welfare" connotes a benefit to the community and not to an individual or a particular class of work-people employed by one employer. For the reasons already given, this does not appear to be the correct approach to the question and, if this paragraph of the opinion does contain a finding of fact, then, in our view, it is based on a misdirection. We would, therefore, answer the second question in the affirmative and hold that the class of persons entitled to benefit is sufficiently wide to entitle the respondents to relief under the section, and it follows that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son*, for Town Clerk, Skegness; *Lawrence C. Jenkins*, Nottingham.

F.G.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND PEARSON, JJ.)

December 4, 1957

HORACE PLUNKETT FOUNDATION v. ST. PANCRAS BOROUGH COUNCIL

Rating—Relief—Hereditament previously exempted from rating as occupied by scientific society—New valuation list—No "total amount of rates charged" previously—No right to reduction of present rate to nil—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (2) (a).

Before the coming into force of the new valuation list on Apr. 1, 1956, a hereditament occupied by the appellants was wholly exempt from rates under the Scientific Societies Act, 1843. For the first year of the new list the appellants, who, it was assumed, were no longer exempt under the Act of 1843, were charged with a rate amounting to £187 15s. 6d. The appellants were an organisation within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, since they were not established or conducted for profit and their main objects were charitable or concerned with the advancement of education and social welfare. They appealed against the rate charged, contending that it exceeded the amount provided by s. 8 (2) and that it should be reduced to nil.

HELD: that s. 8 (2) (a) had no application, because, where no rates had been charged, there was no "total amount of rates" charged with which comparison could be made, and the appellants were not entitled to relief.

CASE STATED by the Appeal Committee of the County of London Quarter Sessions.

On Dec. 10, 1956, the Horace Plunkett Foundation, the appellants, gave notice of appeal against a rate amounting to £817 15s. 6d. which was made on Mar. 31, 1956, by St. Pancras Borough Council, the respondents, in respect of a hereditament, occupied by the appellants, and described in the rate as offices, library, caretakers' rooms and premises, 10, Doughty Street, London, W.C.1; the ground of appeal was that the rate exceeded the amount chargeable under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The following facts were found on the hearing of the appeal.

The appellants came within s. 8 (1) (a) of the Act of 1955, being an organisation which was not established or conducted for profit and whose main objects were charitable or concerned with the advancement of education and social welfare. In the respondents' rate book for the year ending Mar. 31, 1956, the hereditament was entered as follows:—"Exempt, Scientific Societies Act, 1843. Occupied by the Horace Plunkett Foundation", the amount of rates recoverable being entered as "nil"; in the rate book for the year ending Mar. 31, 1957, the hereditament was entered with a rateable value of £259, the rate being 14s. 6d. in the pound and amounting to £187 15s. 6d. Before 1948 the respondents both made assessments for rating and demanded the rates, but since then, assessments were made by the Inland Revenue while the respondents merely demanded and collected the rates; no annual general rate had ever been demanded in respect of the hereditament prior to Apr. 1, 1956, viz., when the new valuation list came into force.

Doubt had arisen whether the appellants were still entitled to claim exemption from rates under the Scientific Societies Act, 1843, but, for the purposes of this case, it was assumed that they were now not entitled to claim that exemption. The appellants contended that, as they were an organisation to which s. 8 of the Act of 1955 applied, the amount of rates charged exceeded the amount provided by s. 8 (2) of the Act of 1955. The respondents contended that as no rate was charged in the year preceding Apr. 1, 1956, s. 8 (2) was inapplicable and the rate was correctly charged. Quarter sessions dismissed the appeal holding that as the rate charged for the year preceding Apr. 1, 1956, was nil, s. 8 (2) did not apply to the rate appealed against. The appellants appealed to the Divisional Court and the question for the court was whether, on the facts stated, quarter sessions came to a correct conclusion.

Harold Williams, Q.C., and *Roots* for the appellants.
Scholefield for the respondents.

The following cases were referred to:—*Jervis v. Tomkinson* (1) and *R. v. Gee* (2).

LORD GODDARD, C.J., having stated the facts, continued: The question that arises is under s. 8 (2) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which provides:

"For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force . . ."

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The question is a pure matter of construction and the words that we have to construe are "the total amount of rates . . . charged". No rates were charged in the year before the new list came into force, and therefore I do not think this provision has any application to this case. If no rates were charged, I do not see that one can consider what was "the total amount of rates . . . charged". The rates chargeable for the first year of the new list are not to exceed the total amount of rates which were charged for the last preceding year; and if no rates were charged there was never a total with which a comparison could be made. Section 1 of the Scientific Societies Act, 1843, provides that no society within that Act "shall be assessed . . ."; such societies, if I may so put it, are completely outside rating altogether. It may be that the appellants are not entitled to exemption under the Scientific Societies Act, 1843, though if they are, their exemption is preserved by s. 8 (6) of the Act of 1955, which provides:

"Nothing in this section shall affect any exemption from, or privilege in respect of, rates under any enactment other than this section."

Speaking for myself, I think that where s. 8 of the Act of 1955 speaks about the total amount of rates charged it is contemplating that some rates were charged, and one has to find what is the total amount of those rates. If, however, there never was any rate charged, one cannot apply a section which deals with the total amount of rates charged.

For these reasons, I am of opinion that quarter sessions came to a correct decision, and the appeal must be dismissed.

DEVLIN, J.: I agree with the construction which my Lord has put on s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I should not like to say that in every conceivable case where words of this sort are used the fact that no charge has been made or a nil amount has been charged would necessarily mean that wording of this sort was inapplicable. Phraseology of this sort must be considered, however, in relation to the section as a whole and the object which it was intended to achieve; and for that reason I have not found the authorities cited by counsel for the appellants on the construction of similar sort of phraseology in other Acts really to be of much assistance.

The object of this section as counsel for the appellants has put it before us is clear enough. There were before 1955, and there are still, a number of premises which are occupied by bodies which have charitable or scientific objects and which accordingly have been wholly exempted from rates. The appellants claim or claimed that they were one of them, and they claimed to be exempt under s. 1 of the Scientific Societies Act, 1843. When the Rating and Valuation (Miscellaneous Provisions) Act, 1955, was passed it was not intended to disturb the position in relation to those societies which were wholly exempt, but it created three new classes of hereditaments of a semi-charitable character, if I may put it that way, and it granted to them not total exemption but a certain measure of relief. The measure of relief, put broadly, was this; the increase in rates that was otherwise contemplated by the Act of 1955 was not to affect them, but they were to remain as they were before subject only to the old rating values. That was a temporary relief, as counsel for the appellants has pointed out, merely to temper the wind to the shorn lamb, because under s. 8 (3) of the Act of 1955, in due course, the local authority may bring their position into line with other premises. The temporary relief was, however, the object of s. 8. It is plainly contemplated, therefore, that s. 8 is dealing with premises which were subject to the old rates. It is also expressly contemplated that s. 8 is not to have anything to do with

premises which were exempt, because s. 8 (6) to which my Lord has referred, says specifically:

"Nothing in this section shall affect any exemption from, or privilege in respect of, rates under any enactment other than this section."

The whole difficulty that has arisen in this case is because the appellants have mistakenly been supposed to be exempt from rates and have therefore been entered in the list as exempt. I say "mistakenly supposed to be" because we have to make the assumption that there is not a good exemption and s. 8 (6) does not apply. The position is that we are dealing with an odd case, a case of a mistake which was never contemplated by the Act. So now, if one turns back to s. 8 (2), and asks oneself: Is it possible that the draftsman of the section or Parliament contemplated no charge and a nil assessment? If it seems clear from the section as a whole that this was contemplated, I should have been disposed to do my best, though I do not know whether I should have succeeded, to give to the words the meaning which could be applied to such a situation. One could, for example, say that a nil charge was a charge of nothing and that the reduction of one hundred per cent. was a proportionate reduction; but I see no need to strain the meaning of the words to achieve that result because it is plain to me that that is not what was contemplated by sub-s. (2) at all. It contemplated a situation in which rates were to be limited and in which there was an old figure to compare with the new. Therefore, I agree with the meaning that my Lord puts on s. 8 (2) (a), which is the natural and right meaning in the contemplation of the section; and I agree that this appeal should be dismissed.

PEARSON, J.: I agree. If one looked only at s. 8 (2) (a) and (b) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, I personally would have felt no difficulty in saying that the figure 0, or nil, is an amount; for it could be said that the amount so chargeable should not exceed the total amount of rates, which one could construe as nil, and then there would be a one hundred per cent. reduction, or one hundred per cent. proportion under s. 8 (2) (b). If, however, one considers the matter in relation to the section as a whole and in relation to the Scientific Societies Act, 1843, the more reasonable view is the one which has been already stated, namely, that where s. 8 (2) uses the expression

"the amount of rates chargeable in respect of a hereditament . . . shall, subject to the following provisions of this section, be limited as follows",

that applies only to a case in which some rates have been charged, and in which some figure exceeding nil is to be in some way limited. For there was the provision for total exemption that was made by s. 1 of the Scientific Societies Act, 1843. This was that "No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay" any sum in respect of rates. The position where there was that total exemption does not reasonably fall within the wording used in s. 8 (2) of the Act of 1955.

For those reasons I agree with the decision that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Barfield & Barfield; Town Clerk, St. Pancras Borough Council.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND PEARSON, J.J.)

December 6, 1957

WERNICK v. GREEN

Animals—Poultry—Records—Poultry dealer—Poultry purchased and sold for slaughter—Poultry “fed” for slaughter—Meaning of “fed”—Poultry already fattened before purchase—Live Poultry (Movement Records) Order, 1954 (S.I. 1954, No. 122), art. 2 (1).

Article 3 of the Live Poultry (Movement Records) Order, 1954, requires poultry dealers to keep records, and failure to keep such records is an offence under s. 78 (1) (i) of the Diseases of Animals Act, 1950. By a proviso to art. 2 (1) of the order a person is not to be deemed a poultry dealer by reason only that he sells for slaughter poultry “which he has purchased and fed for the purpose.”

The appellant purchased poultry, which he sold for slaughter. Most of the birds were already fattened when he purchased them, and a substantial number were retained by him on his premises for one day only before re-sale and were fed to keep them alive and to avoid cruelty. The appellant did not keep the records required by the order and was convicted of failure to keep them, the magistrate being of opinion that “fed for slaughter” in the proviso to art. 2 (1) meant “fattened for slaughter.”

HELD: that “fed” did not mean “fattened”, and that, as the appellant had fed the poultry for slaughter, he came within the proviso to art. 2 (1) and that the conviction must be quashed.

CASE STATED by the stipendiary magistrate for South Staffordshire.

On Mar. 11, 1957, an information was preferred by Frederick Green, the respondent, against Joseph David Wernick, the appellant, alleging that, between Oct. 10, 1956, and Dec. 14, 1956, the appellant, being a poultry dealer, had contravened the Live Poultry (Movement Records) Order, 1954, art. 3, by failing to keep a record containing the particulars specified in art. 3, contrary to s. 78 and s. 79 of the Diseases of Animals Act, 1950. Article 2 (1) of the Order of 1954 defined a poultry dealer and provided:

“... a person shall not be deemed to be a poultry dealer by reason only that he sells for slaughter poultry which he has purchased and fed for that purpose.”

On the hearing of the information it was found that at all material times the appellant was habitually engaged in the business of buying and re-selling poultry for slaughter, the greater part bought being already fattened for slaughter. The expression “fed for slaughter” as used in the farming industry meant “fattened for slaughter”. All the poultry purchased by the appellant was sold by him for slaughter and a substantial proportion was retained on his premises for only one day before being sold. The appellant gave food to the poultry on his premises in order to keep them alive and to avoid cruelty. He did not keep records in accordance with the Order of 1954.

The appellant contended that he was not a poultry dealer within art. 2 (1) of the Order of 1954, as he sold for slaughter poultry which he had purchased and fed for that purpose; that the onus of proving he was a dealer within art. 2 (1) was on the respondent, and that the word “fed” should be given its ordinary and natural meaning. The respondent contended that the onus of proof was on the appellant; that the word “fed” meant “fattened” and the purpose of the proviso to art. 2 (1) was to protect dealers who not only sold poultry for slaughter but also fed them for slaughter; that the word “immediate” before

the word "slaughter" was not inadvertently omitted from the proviso as it was omitted from a similar exemption in the Live Poultry (Restrictions) Order, 1954, and that if the word "fed" meant merely the casual provision of sufficient food to avoid hunger, this would lead to contraventions of art. 7 (2) of the Live Poultry (Restrictions) Order, 1954.

The stipendiary magistrate found that the appellant had committed the alleged offence because the word "fed" in the proviso to art. 2 (1) of the Order of 1954 meant "fattened" and the appellant had not proved that he fattened the poultry before he sold them for slaughter; accordingly, the appellant was convicted. The question for the court was, whether on the facts found, the magistrate came to a correct conclusion in law.

P. C. Northcote for the appellant.

Wingate-Saul for the respondent.

LORD GODDARD, C.J.: By the Live Poultry (Movement Records) Order, 1954, it is provided that poultry dealers shall keep records. I have no doubt that that is for the purpose of enabling the inspectors of the Ministry of Agriculture, Fisheries and Food to trace disease, fowl pest, and so on, and to discover the place where it started. The order states, in art. 2 (1), that a poultry dealer "means a person habitually engaged in the business of buying and reselling poultry or day-old chicks", but art. 2 (1) exempts auctioneers, and also provides that

"a person shall not be deemed to be a poultry dealer by reason only that he sells for slaughter poultry which he has purchased and fed for that purpose."

So if a person is selling poultry for slaughter he is not a poultry dealer provided that he has fed the birds for that purpose. The learned magistrate in this case has construed "fed" as meaning "fattened". He has also found that all the poultry purchased was sold by the appellant for slaughter; that a substantial proportion of the poultry was retained by the appellant on his premises for only one day before being resold for slaughter; and that he gave food to poultry on his premises to keep them alive and avoid cruelty.

I do not think that we are entitled, in a section which creates a criminal offence, to say that "fed" necessarily means "fattened" because a man may buy poultry for sale but may also buy birds which are already fattened or partly fattened. Why should he not? If he is buying birds and is going to sell them for slaughter, he would not want the birds he buys to get thin, and, therefore, he would feed them. He may give the birds more food or less food, but he certainly would not let them get thin, and I think that they are being fed for the purpose for which he keeps them because he is going to sell them. If the Ministry of Agriculture want to restrict the exception, they must try their hands with some other Order; but on the finding that the appellant did feed the poultry I do not think that any offence is committed, and for these reasons I would quash the conviction.

DEVLIN, J.: I agree. If, as counsel for the respondent submits, the Minister intends "prepared for slaughter" should be equivalent to "fattened", and that is what the magistrate has found, it is difficult to see why the Minister did not use the word "fattened". It is suggested that if he had used the word "fattened", people might have interpreted that to mean that a bird was not being fattened while the fat content was increased and the lean content remained

stationary. I should have thought the word "fattened" would have conveyed what counsel for the respondent says the Minister intended it to convey to anybody; but we have to construe the phrase "fed for slaughter" and, like my Lord, I am unable to see why if the bird is given food to prevent it getting thinner, it is not just as much "fed for slaughter" as if it were given food to fatten it and increase its weight. For these reasons, I agree with the conclusion my Lord has proposed.

PEARSON, J.: I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Woolley & Co.*, Wolverhampton;
Solicitor, Ministry of Agriculture, Fisheries and Food.

T.R.F.B.

LEEDS ASSIZES

R. v. PRITAM SINGH

(Mr. Commissioner Wrangham)

December 12, 1957

Trial—Oath—Affirmation—Conditions precedent to affirmation—Sikh affirming owing to impracticability of administering oath according to his religion—"Lawfully sworn"—Oaths Act, 1888 (51 & 52 Vict., c. 46), s. 1—Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), s. 1 (1), s. 15 (2).

The defendant, a Sikh, had been a witness in proceedings against another person in a magistrates' court. According to the defendant's religion, the Sikh faith, an oath sworn on the "Granth", the holy book of the Sikhs, would have been binding on the defendant, but, as no copy of the "Granth" was available in the magistrates' court, it was impracticable to administer an oath to the defendant in accordance with his religion and he made an affirmation before giving his evidence. The defendant had not objected to taking the oath according to his religion. He was later charged with having committed perjury in the proceedings in the magistrates' court.

HELD: the defendant was not "lawfully sworn," within s. 1 (1) of the Perjury Act, 1911, in the magistrates' court, because, under s. 1 of the Oaths Act, 1888, a person was permitted to make a solemn affirmation instead of taking an oath only if he objected to taking an oath on one of the two grounds provided by that section, and, therefore, there was no case to go to the jury on the charge of perjury.

TRIAL on indictment.

The defendant, Pritam Singh, was charged, before Mr. Commissioner WRANGHAM and a jury at Leeds Assizes, with having committed perjury in proceedings against another person at the magistrates' court at Huddersfield. The defendant was a Sikh and an oath sworn by him on the "Granth", the holy book of the Sikhs, would have been binding on him. A copy of the "Granth" was not available at the magistrates' court and the defendant made an affirmation before giving his evidence. At the trial of the defendant, after evidence for the Crown had been given, counsel for the defence submitted that there was no case to go to the jury because the defendant had not been lawfully sworn in the proceedings in the magistrates' court.

E. John Parris for the defendant: The defendant was not "lawfully sworn", within s. 1 (1) of the Perjury Act, 1911. The sub-section reads:

"If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . ."

The original Act permitting an affirmation to be made instead of an oath was the Quakers and Moravians Act, 1833, which was enlarged by the Oaths Act, 1888. Section 1 of the Act of 1888 reads:

"Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath."

The form of affirmation is contained in s. 2. It will be seen from s. 1 that it is the witness himself who must make the objection—that is a condition precedent before he can be lawfully affirmed. Then there are two grounds on which he may be lawfully affirmed, namely, (i) if he is an agnostic, and (ii) if he says that the taking of an oath is contrary to his religious belief, as it is, for example, in the case of Quakers who believe that, when Our Lord forbade swearing, that precluded the taking of an oath. Neither of those two grounds set out in s. 1 applies in the present case, and I submit that, if a person who says that he is a Sikh is allowed to affirm, the affirmation is unlawful.

The position at common law is stated in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd ed.) (1954), p. 507, para. 857:

"The general common law rule is that the testimony of a witness to be examined *viva voce* in a criminal trial is not admissible unless he has previously been sworn to speak the truth."

R. v. Moore (1) is a case exactly on this point, even the religion of one of the two witnesses in that case being the same as that of the defendant. Although each of the witnesses had a religious belief and no religious objection to taking an oath, he made an affirmation and gave evidence. No objection to the evidence was taken until after the verdict had been given. It was held by the Court for Crown Cases Reserved that the evidence was inadmissible. In ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd ed.), p. 1288, in a note to s. 15 (1) of the Perjury Act, 1911, some doubt is thrown on the binding authority of the decision in *R. v. Moore* (1), which, being in 1892, was a direct commentary on the Act of 1888. In my submission, the doubt is quite wrong. Section 15 (1) of the Act of 1911 reads:

"For the purposes of this Act, the forms and ceremonies used in administering an oath are immaterial, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him."

That sub-section relates to oaths. For the position in regard to affirmation one must turn to s. 15 (2), which reads:

"... The expression 'oath' in the case of persons for the time being allowed by law to affirm . . . instead of swearing, includes 'affirmation' . . ."

(1) (1892), 56 J.P. 345.

In a note between those two sub-sections, as set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd ed.), p. 1288, it is stated:

"Oath in this sub-section [s. 15 (1)] includes affirmation and it appears to override *R. v. Moore* (1)."

In my submission, however, that note is not correct, because, when the interpretation of the word "oath" is enlarged to include affirmations, it is only affirmations "in the case of persons for the time being allowed by law to affirm"—in other words, persons who are allowed to affirm under s. 1 of the Oaths Act, 1888, which permits a person to affirm only if he objects to taking an oath on one of the two grounds stated in the section. At common law evidence was inadmissible unless an oath was taken. The Act of 1888 made one exception, and another exception is in the case of young children: only these exceptions are permitted. Therefore, in my submission, the evidence of the defendant was inadmissible.

J. A. Cotton for the Crown: I submit that the court in this particular instance was entitled to have the defendant affirm. The practical difficulty in this case is that the "Granth" is a bible of which only three copies are known to exist in this country. Two are kept in the custody of temples, and the copy produced here today is, I understand, from the library in Leicester. No such copy was available at the Huddersfield magistrates' court, and in those circumstances the defendant was asked to make an affirmation.

MR. COMMISSIONER WRANGHAM gave the following ruling: Members of the jury, the position is this. Strictly speaking, in a case of this kind, the duty of the prosecution is to bring before the court the whole of the evidence which they have, and then, at the end of that evidence, it is open to counsel for the defendant to submit to me that for some reason or other there is no evidence for the jury to consider. Ordinarily, I would then have to give a ruling on that submission and say either that there was evidence for you to consider, in which case you would consider it, or that there was not, in which case I should have to direct you to return a verdict of "Not guilty" because there was not enough evidence to justify your even considering it. In this case it is agreed by both learned counsel that it would be idle to go through the formality of hearing the whole of the evidence if I were of opinion that the defendant was not properly sworn in the Huddersfield magistrates' court.

The charge against the defendant is that he committed perjury in the magistrates' court in a case against a man called Mohammed Ali. It is clear, members of the jury, that the first thing that the prosecution have to prove in order to establish their case is that the defendant was lawfully sworn. They then have to prove that he said what they say he did. They then have to prove that what they say he said was untrue and untrue to his knowledge. But before we get to the question of what he said and whether it was true or not, we have, first, the question whether he was lawfully sworn. The evidence is that he was not sworn at all, he was affirmed. There is an Act of Parliament [the Oaths Act, 1888, s. 1], which provides that any witness who wants to affirm, on the ground that he has no religious belief (because he is, for example, an atheist) or that his religious belief forbids him to take the oath (for example, in the case of a Quaker), can affirm instead of taking the oath. If there was any indication that the defendant fell into either of those two classes, his affirmation would be as good as his oath and he would be equally liable to be prosecuted for perjury. The evidence, however, is precisely the other way. The evidence is that the defendant has a

religious belief, the Sikh faith; that there is a form of oath which he would regard as binding on him as a Sikh; and that, in any case, he never indicated that he wanted to affirm. The real reason why he affirmed instead of taking the oath was because it was impracticable in the magistrates' court to administer the Sikh oath. Apparently, the holy book of the Sikh religion is very difficult to procure, and it was not available in the magistrates' court. You may think that, where it was found impossible or difficult that a man should be sworn according to the oath of his own religion, it would be reasonable if Parliament provided that he should be permitted by his own consent to affirm and that such affirmation should count as an oath, but Parliament has not yet made such an enactment. In the circumstances, therefore, I am bound to direct you that there never would be evidence fit for you to consider on this charge, and I therefore ask you to return on my direction a formal verdict of not guilty on this indictment.

[The jury returned a verdict of Not Guilty.]

E. John Parris: I wonder if your Lordship would let me say at this stage that, had the case gone further, the defendant would have strongly asserted that what he said on affirmation was the truth.

MR. COMMISSIONER WRANGHAM: You want it known that there was, in fact, a conflict on the merits? It is right that it should be known there was that conflict.

Solicitors: *Drabble & Stephenson*, Huddersfield; *Town clerk*, Huddersfield.

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND HAVERS, JJ.)

December 2, 13, 1957

ROYAL COLLEGE OF NURSING *v.* ST. MARYLEBONE CORPORATION

Rating—Relief—Organization whose main objects charitable—Royal College of Nursing—Promotion of the "advance of nursing as a profession"—Incidental benefits to individual nurses—Rating & Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (a).

Article II (B) of the amended charter of the Royal College of Nursing stated, as its main objects: "to promote . . . the purposes hereinafter set out and in particular (a) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing; (b) to promote the advance of nursing as a profession in all or any of its branches . . ." It was conceded that object (a) was charitable. The college, the activities of which included giving full-time education in the art and science of nursing, claimed limitation of rates under s. 8 (2) of the Rating and Valuation Act, 1955, on the ground that they were "an organisation whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare" within the meaning of s. 8 (1) (a). The claim having been rejected by the rating authority, the college appealed to quarter sessions who allowed their appeal, and, on the case being sent back to them by the Divisional Court for further findings, found that the objects in art. II (B) (a) and (b) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself". On appeal to the Divisional Court,

HELD: that the words "advance of nursing as a profession" in art. II (B) (b) were directed to the advancement of nursing and not to the advancement of the professional interests of nurses; the second main object of the college was, therefore, charitable; and the college was entitled to the relief claimed.

General Nursing Council for England and Wales v. St. Marylebone Corpn. (ante, p. 67, distinguished).

CASE STATED by County of London Quarter Sessions

On Apr. 12, 1957, the County of London Quarter Sessions allowed the appeal of the Royal College of Nursing, who were rated in respect of certain premises occupied by them in the borough of St. Marylebone, against the rejection by the rating authority of a claim by the ratepayers that they were entitled to rating relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The rating authority, the St. Marylebone Corporation, appealed to the Divisional Court. The case first came before the Divisional Court on Oct. 16, 1957, but was then remitted to quarter sessions for further facts to be found.

Widgery for the rating authority.

Rowe, Q.C., and *Blain* for the ratepayers.

Cur. adv. vult.

Dec. 13. **DONOVAN, J.**, read the judgment of the court: The appellants in this case are the St. Marylebone Corporation who are the rating authority for the borough. The respondent ratepayers are the Royal College of Nursing, a non-profit-seeking organisation. In January last the rating authority rejected a claim by the ratepayers for rating relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The ratepayers appealed against that refusal to London Quarter Sessions, who allowed the appeal. From that decision the rating authority now appeal to this court by way of Case Stated.

Section 8 provides a measure of rating relief in the case of

"... any hereditament occupied for the purposes of an organisation ... not ... conducted for profit ... whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare ..."

The ratepayers were incorporated by royal charter in 1928, and they occupy for the purposes specified in that charter the hereditament for which they seek rating relief, namely, 1 and 1A, Henrietta Place, London, W. The ratepayers' charter recites that a petition for incorporation by royal charter had been presented to the Sovereign by "The College of Nursing, Ltd." and art. I of the charter incorporates the ratepayers under the title of "The College of Nursing". Article II then provides as follows:

"The purposes for which the college is established and incorporated are as follows:—A. To acquire and take over all the assets property possessions effects and liabilities of the said company. B. To promote, by means of such assets and otherwise, the purposes hereinafter set out and in particular (a) to promote the science and art of nursing and the better education and training of nurses and their efficiency in the profession of nursing; (b) to promote the advance of nursing as a profession in all or any of its branches ..."

It is not necessary for the purposes of this case, which is concerned only with the "main objects" of the ratepayers to set out any of the other "purposes" specified in art. II (B) of the charter, several of which are, in any event, not purposes at all, but simply powers to effect purposes already specified earlier in the article.

The original decision of quarter sessions was in these terms:

"We were of opinion that the main objects of the ratepayers were such as to attract the application of s. 8 of the Act."

On the Case coming before us we took the view that the findings should be more specific, and the Case was returned to quarter sessions for them to state (1) What is or are the main object or objects of the college, (2) In the case of such object or objects is it (a) charitable, (b) if not, is it otherwise concerned with the advancement of education, (c) is it otherwise concerned with the advancement of social welfare?

Quarter sessions have now answered these questions as follows:

"(1) We found that the main objects of the college were those set out in art. II (B) (a) and (b) of its charter. (2) The objects in art. II (B) (a) were admitted to be charitable. We were further of opinion that the object in art. II (B) (b) was either 'charitable' or 'otherwise concerned with the advancement of social welfare' for we were satisfied on the evidence written and oral that the objects in art. II (B) (a) and (b) were mutually complementary in that both were directed to a single end, namely, the raising of the standard of nursing for the benefit of the community rather than the promotion of the professional interests of nurses as an end in itself."

Between the time when the Case was sent back to quarter sessions, and the further arguments that we have now heard on the amplified findings, two cases on s. 8 were heard by the Court of Appeal and certain pronouncements made which it will be convenient here to summarise:—

(1) To qualify for relief under s. 8 all the main objects of an organisation must be of the kind specified in the section. If one of such main objects is of a different kind, relief is not due: *Berry v. St. Marylebone Corpn.* (1).

(2) Where an organisation has a written constitution the court should normally resort to that alone to ascertain its objects, though its activities are relevant to an inquiry as to what its main objects are, and this may involve oral evidence of such activities. But once the main objects of an organisation are ascertained, extrinsic evidence is not admissible to limit the proper meaning of the language by which such main objects are described in the written constitution.

(3) Once the main objects of an organisation have been ascertained, and one of them is not of the kind specified in s. 8, rating relief under the section cannot be secured by regarding such main object as ancillary to another main object which is of the kind so specified. Ancillary or not, the one object will still be a main object, and if it is outside the scope of the section relief will not be due:—

"... it may not be useful or even possible to try to give a primacy to the one purpose rather than to the other; and all the more, perhaps, should the attempt be abandoned in the present case, where the statute speaks of 'main objects' in the plural."

(per LORD EVERSHED, M.R., in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (2). On the question of treating one object as paramount and the rest subsidiary and subordinate we might perhaps ourselves add, without quoting, a reference to what LORD PARKER OF WADDINGTON said on this point in *Bouman v. Secular Society, Ltd.* (3).

The rival contentions may now be stated. The rating authority say that the object specified in art. II (B) (b), that is, the advance of nursing as a profession

(1) [1957] 3 All E.R. 677.

(2) [1957] 3 All E.R. 685.

(3) [1917] A.C. 406.

is now found to be one of the ratepayers' main objects. The language in which this object is expressed is wide enough to cover the advancement of the professional interests of nurses. The ratepayers in practice do so construe the language, for the exhibits in the Case Stated establish that they actively concern themselves with the advancement of such interests. Accordingly, the ratepayers do not qualify for relief under s. 8, for the promotion of the professional interests of nurses is neither a charitable object nor an object otherwise concerned with the advancement of social welfare, albeit that one result of pursuing such an object may be the improvement of the standard of nursing generally (*General Nursing Council for England and Wales v. St. Marylebone Corpn.* (1)). The ratepayers, it is said, cannot overcome the difficulty by treating this object as ancillary to some other object, for quarter sessions have found it to be one of the main objects.

The ratepayers contend that read as a whole the finding of quarter sessions really means that there are not two main objects but only one, namely, the raising of the standard of nursing for the benefit of the community. Alternatively, that if there are two main objects, the second is the advancement of nursing as opposed to nurses, and the interests of nurses are looked after simply as a means of attaining this object, not as an end in itself. Whichever view be taken, therefore, of the finding of quarter sessions, the ratepayers are entitled to the relief that they seek.

There is no ambiguity about the language of para. 1 of the further findings of quarter sessions. It says expressly that the college has two main objects. In para. 2, however, they seem to suggest that the college has really one object (it is called "a single end"), namely, the raising of the standard of nursing for the benefit of the community; so that the two main "objects" are means to that one end. It is this language which raises a doubt as to the sense in which quarter sessions use the term "objects" in para. 1 of their further findings. Curiously enough, however, their language is very similar to that used by A. L. SMITH, L.J., in *Art Union of London v. Savoy Overseers* (2).

"... if the other object be only a means to the one end . . . then the society has a sole and exclusive object, and not another object subsidiary thereto."

(It should be said that this was a dissenting judgment but on a quite different point, namely, whether subscriptions to the Art Union were voluntary contributions. A. L. SMITH, L.J., thought not, and the House of Lords afterwards unanimously upheld him. In the face, however, of the clear finding that the college has two main objects we do not feel able to read the second paragraph of the further finding in such a way as to contradict the first. We think that we should consider the case on the footing that the ratepayers have the two main objects found by quarter sessions. The question then becomes this: Is the second main object, as expressed in the charter, charitable or otherwise concerned with the advancement of social welfare?)

We have already stated the rating authority's contention on this point. It is reinforced by their counsel in this way. He says that it is not right to treat this object as being simply the advance of nursing by means of improving the lot of nurses so as to make them more efficient, for that is already covered by the terms of the first object; and if that were all that was contemplated the second object would be unnecessary. This argument is cogent, but not, by itself,

(1) [1957] 3 All E.R. 685.

(2) 59 J.P. 20; [1894] 2 Q.B. 609; *reversd.* H.L. sub nom. *Savoy Overseers v. Art Union of London*, 60 J.P. 660; [1896] A.C. 296.

conclusive. For in documents setting out the objects or purposes of an organisation tautology is unfortunately the rule rather than the exception. Things are constantly being expressed as "purposes" or "objects" when they are really no more than powers, or means to effect a purpose or object already expressed. There are several "purposes" in art. II which are really no more than powers. Article II (B) (j) is, perhaps, the clearest example. Furthermore, the opening words of art. II are apparently intended to be read together with paras. (B) (a) and (b); and so read, the result is this:

"The purposes for which the college is established and incorporated are . . . to promote . . . the purpose [of promoting] the science and art of nursing . . . [and] to promote [the promotion of] the advance of nursing as a profession . . .",

which is hardly the best example of the draftsman's art, and affords no inducement to construe art. II as though it were a work of precision with no overlapping at all between its various sub-paragraphs. Finally, on this point, the language of art. II (B) (b) enables the college to take appropriate steps to increase the numbers of those taking up the vocation of nursing, a very necessary thing, but which, on a strict construction, might be thought to be outside the scope of the language of art. II (B) (a). We are not able, therefore, to treat the rating authority's argument on this point as decisive.

Counsel for the rating authority also contended that art. II (B) (b) is not only wide enough to cover the advancement of the professional interests of nurses, but is so construed by the ratepayers in practice. He referred to exhibit C to the Case, a publication entitled "Royal College of Nursing. Observations and Objectives". It states under the heading:

"Conditions of service: The Royal College of Nursing, the largest and most representative professional organisation for nurses, takes a leading part in obtaining for them good economic and social conditions. It does so in the spirit of its royal charter: 'to promote the advance of nursing as a profession in all or any of its branches.' . . . The college takes a leading part in obtaining good and equitable working conditions for the profession, both in the interests of nurses themselves and their service to the community."

This work is, however, bound to be done whichever of the rival constructions of art. II (B) (b) is correct. If the objective is the advancement of the professional interests of members then obviously these activities are the working out of that purpose. If, on the other hand, the objective is the advance of nursing as an art, the same work still has to be done because the art of nursing cannot be advanced by an insufficient force of drudges. At any rate that is a reasonable view. Accordingly, one cannot draw a safe conclusion in this case merely by considering these particular activities, for they are consistent with the contentions of both sides.

We return, therefore, to the actual language of the article. If it simply read "to promote the advance of nursing in all or any of its branches", then the object would be clearly and admittedly charitable. It would be a purpose beneficial to the community and entirely analogous to the charitable objects specified in the preamble to the Statute of Elizabeth expressly preserved and set out in the Mortmain and Charitable Uses Act, 1888, s. 13 (2). It is the addition of the words "as a profession" which cause the difficulty in the present case and give rise to the dispute.

There have been similar controversies before. The charter of the Institute of Civil Engineers, for example, stated its object to be: see *Institution of Civil Engineers v. Inland Revenue Comrs.* (1).

"... the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer..."

The institute held examinations, awarded prizes, maintained a library of great advantage to consulting engineers, laid down rules of professional conduct, and gave members the exclusive right to use distinguishing letters after their name. The institute appealed to the Special Commissioners of Income Tax against the refusal of the Commissioners of Inland Revenue to afford it exemption from income tax as a body of persons established for charitable purposes only. Before the Special Commissioners there was evidence that the expectation of professional advantage probably prompted engineers to join the institute. The report of the council of the institute for 1926-27 also contained this passage see the report in 16 Tax Cas. at p. 165:

"The protection of the interests of members of the institute is engaging the council's earnest attention... the council wish to assure the members of their intention to resist to the utmost any impairment of the liberty of professional practice now enjoyed by members."

The Special Commissioners, and on appeal ROWLATT, J., decided that one object of the institute was to benefit its members, and accordingly it was not established for charitable purposes only. The Court of Appeal reversed this decision: *Institution of Civil Engineers v. Inland Revenue Comrs.* (1). Reference was made to an earlier case, *Inland Revenue Comrs. v. Forrest* (2) where the House of Lords had held that the institute was relieved from duty on annual value under the Customs and Inland Revenue Act, 1885, as being a body corporate whose property was appropriated and applied for the promotion of science and not for the benefit of civil engineers. There, too, it had been contended unsuccessfully against the institute that its main purpose was to promote the interests of civil engineers. Dealing with this LORD MACNAGHTEN had said in *Forrest's* case (2):

"... the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?"

The majority of the House had answered the first of these questions in the affirmative, and the second in the negative. The Court of Appeal in *Institution of Civil Engineers v. Inland Revenue Comrs.* (1) held that the position was still the same. LORD HANWORTH, M.R., and LAWRENCE and ROMER, L.JJ., applied the same test as that laid down by LORD MACNAGHTEN and held that the purpose of the institute was the promotion of the science of civil engineering and not the interests of civil engineers. It was true that civil engineers benefited professionally from their membership, but that was simply a consequence of the way in which the institute pursued its charitable purpose.

In 1952 the House of Lords had to decide whether the Royal College of Surgeons

(1) [1932] 1 K.B. 149.

(2) (1890), 54 J.P. 722; 15 App. Cas. 334.

of England was a charity: *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (1). The objects of the college were not set out separately in its charter; they had to be extracted from a recital in it. The relevant words were these:

"the due promotion and encouragement of the study and practice of the said art and science",

that is, of surgery. The House of Lords, reversing the decision of the Court of Appeal, held that the words did not include the promotion of the professional interests of surgeons. If those interests were benefited, that was simply a consequence of the work done by the college which was the promotion of the art and science of surgery by education both practical and theoretical. It is right to say that LORD COHEN took a different view, namely, that the disciplinary and "defence" activities of the college were themselves "objects" of the college, not ancillary to the main charitable object, and that the appeal of the college ought therefore to fail. For present purposes the decision is material in that the House of Lords tacitly approved the decision of the Court of Appeal in *Institution of Civil Engineers v. Inland Revenue Comrs.* (2), and that LORD MORTON OF HENRYTON regarded it as important that nowhere in the charter of the College of Surgeons could one find a statement that one of the objects of the college was the promotion of the interests of individuals carrying on the profession of surgeons.

Inland Revenue Comrs. v. Yorkshire Agricultural Society (3) was also cited to us, but need not be dealt with at length. The Crown's allegation in that case, that one of the society's objects was to benefit its members, rested not on the language in which its objects were set forth, but on the rules of the society and the privileges provided for members pursuant to them. A passage from the judgment of ATKIN, L.J., is, however, of importance. He says:

"There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only. That I imagine to be this case."

This was followed in 1928 by *Geologists' Association v. Inland Revenue Comrs.* (4). The actual decision, namely, that it was an association for the benefit of its members which advanced the science of geology only incidentally, is not of importance for present purposes. But in the course of his judgment in the Court of Appeal GREER, L.J., said:

"It was interesting to note how those who argued the case for the appellants found it necessary to contend that there can in law be only two kinds of society, one a society whose object was the cultivation of the or charitable object. It seems to me that there may be associations in

(1) [1952] 1 All E.R. 984; [1952] A.C. 631.

(2) [1932] 1 K.B. 149.

(3) [1928] 1 K.B. 611.

(4) (1928), 14 Tax Cas. 271.

between these two, associations with two objects, one being the promotion of an object which is charitable, and the other being the promotion of the interests of the individual members of the association. Then it becomes a question which is one of some degree. There may be a question of fact, or it may be a question of law upon the evidence given, as to whether the interests of its members, and another a society whose sole object is a public benefits conferred upon the members of the society are only incidental to the public objects of the society, or whether, on the other hand, they are largely intended, or mainly intended, for the benefit of the members. If you come to the conclusion, as you may in many cases, that one of the ways in which the public objects of an association can be served is by giving special advantages to the members of the association, then the association does not cease to be an association with a charitable object because incidentally and in order to carry out the charitable object it is both necessary and desirable to confer special benefits upon the members. That is the view expressed by ATKIN, L.J., in the case of *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (1), and it is a view with which I entirely agree."

Here GREER, L.J., is contemplating two objects, one of which is to give benefit to members of the organisation, and he appears to say that if that is done simply as a necessary and desirable way of carrying out the charitable object, then the organisation would not cease to be an association with a charitable object. In this context of income tax that would mean "a charitable purpose only".

Bearing all these matters in mind, the question which we have to answer is this: Is the second object of the ratepayers as expressed in art. II (B) (b) of its charter the advancement of nursing or the advancement of the interests of nurses? This is purely a question of construction of the language used. In favour of the ratepayers' construction this may be said, namely, that the actual words are "the advance of nursing"; but they are followed by the words "as a profession", and the problem really narrows down to the effect of these words.

What is meant by the advance of some particular calling as a profession? If, for example, one says that in the last fifty years there has been a striking advance in the profession of accountancy, what idea is conveyed? Presumably this, that the profession has greatly increased in stature, importance, membership and general esteem, not simply that the fees have gone up, although that might be assumed as a consequence. How then is a profession to be "advanced" in this sense? The answer is, by service. Demands for more pay and better conditions for those engaged, however loud and persistent, and even successful, will not "advance" the profession in the sense that we have defined; but improvement in the quality and range of services rendered, and the spectacle of constant endeavour to do better, will certainly have that effect. If, then, one finds an organisation one of whose objects is to advance nursing as a profession, there is no great difficulty in interpreting this as meaning to improve the quality and range of the services which nurses give and so to enhance the stature and importance of the nursing profession and the esteem in which it is held. It may well be, of course, that in order to improve nursing services more entrants must be attracted into the profession, and that this in time will mean improvements in pay and conditions; but such improvements will be means, not ends.

One may look at the matter, perhaps, from another angle also. Suppose that the draftsman had submitted art. II (B) (b) to the ratepayers in a form which read "To promote the advance of nursing in all its branches", and no more, he

might reasonably have been asked: Is this language enough to enable us to look after the conditions under which nurses work, for to improve their conditions is one of the most important ways in which nursing can be advanced? And to that he might reasonably have answered: Well, I will add the words "as a profession", which will be wide enough to cover the point. In such circumstances the object would still be the advance of nursing.

On the other hand, if the ratepayers' object were to advance the professional interests of nurses they might well say: Why do we wish to speak about the advance of nursing? Let us simply say "To promote the interests of all those in the nursing profession". There is no avowal here in such clear terms of such an object, as there was not in the *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (1), a fact to which LORD MORTON drew attention.

If the article now in question is to be regarded as ambiguous so that surrounding circumstances may be looked at to help to resolve the ambiguity then two matters would seem to be important: (i) that the ratepayers are a college giving full-time education in the art and science of nursing, and are not an organisation called into being simply to protect and improve the pay and working conditions of nurses; and (ii) that quarter sessions seem to have found that under the article in question the activities of the ratepayers are directed to the raising of the standard of nursing, rather than to the promotion of the interests of nurses as an end in itself.

The problem here presented is one where, no doubt, there is room for two views, and in most of the cases we have referred to there was a divergence of judicial opinion. The present case, however, is a somewhat special one, and in the end we have come to the conclusion that on its true construction art. II (B) (b) is directed to the advance of nursing, and not to the advance of the professional interests of nurses. That means that this second main object of the ratepayers is charitable.

If that be right, there is no conflict between this decision and the recent decision of the Court of Appeal in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (2). On different facts it was there held that the professional benefit of nurses was a main object of the council. For the reasons we have given we do not think it is so in the case of the ratepayers.

Having arrived at this conclusion, we may mention, although the fact is not referred to in the Case, that both sides informed us that ever since 1936 the ratepayers have been regarded by the Commissioners of Inland Revenue as a body of persons established for charitable purposes only, and so exempt from income tax. In 1936 the same point as has now come before us was argued out before the Special Commissioners, who took a similar view to that which we have now taken about art. II (B) (b), and the Crown acquiesced in this decision and have done so ever since. We have not been influenced by this in coming to our own view, but we cannot help thinking that the ratepayers would have been well advised, after the challenge in 1936, suitably to amend the article in question so as to make its meaning clear. Perhaps their failure to do so is another piece of evidence showing that the ratepayers do not have as one of their main objects the promotion of the interests of their members as an end in itself. We dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.; Charles Russell & Co.*

T.R.F.B.

(1) [1952] 1 All E.R. 984; [1952] A.C. 631.

(2) [1957] 3 All E.R. 685.

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COURT OF APPEAL

(LORD EVERSHERD, M.R., ROMER AND ORMEROD, L.J.J.)

November 22, 25, 27, 28, December 16, 1957

BROWNSEA HAVEN PROPERTIES, LTD. v. POOLE CORPORATION

Road Traffic—Regulation of traffic—"One-way street"—Order for six months' summer season—Town Police Clauses Act, 1847 (10 & 11 Vict., c. 89), s. 21. Crown—Treasury Solicitor—Appearance for local authority—Interest of Crown.

By s. 21 of the Town Police Clauses Act, 1847, certain local authorities were empowered to make "orders for the route to be observed by all carts, carriages, horses, and persons . . . in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed . . ." A local authority, purporting to act under the powers conferred by s. 21, made an order, dated March 5, 1957, which, in effect, created for the period of the summer season, viz., from April 19, 1957, to October 19, 1957, a one-way street system in two adjoining streets. Section 46 (2) of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933, gave local authorities express power to make one-way street orders, which, however, would not be effective unless confirmed by the Minister of Transport. The plaintiffs, who owned a hotel in one of the two streets in question, asked for a declaration that the order of March 5, 1957, was ultra vires the powers contained in s. 21 of the Act of 1847 on the grounds (i) that a one-way street order was not an order for "the route to be observed" by vehicles; and (ii) that the powers were limited to special or extraordinary occasions and did not provide authority for the making of orders for an indefinite period. VAISEY, J., held that the order made by the local authority was ultra vires and void, and the local authority appealed. On their behalf it was submitted (i) that in 1914 the Divisional Court in *Teale v. Williams* (78 J.P. 383) decided that s. 21 of the Act of 1847 was not confined to special occasions, that that decision had been followed ever since, and that it should not be overruled; (ii) alternatively, that the summer season was a "special occasion". The plaintiffs raised the preliminary point that the appeal was not properly before the court because the Treasury Solicitor, acting on the instructions of the Minister of Transport and Civil Aviation, was not entitled to represent the local authority, as the Crown had no interest in the subject-matter in suit, the order complained of had lapsed, and the only question was one of costs between the parties.

HELD: (i) notwithstanding that the order was no longer in force the general question remained whether the local authority had power to make one-way street orders under s. 21 of the Act of 1847, and, as traffic control was a matter of national concern, the Crown had an interest in the lis which warranted the Treasury Solicitor representing the local authority; (ii) the words "the route to be observed" in s. 21 were wide enough to allow the making of one-way street orders, but the order of March 5, 1957, was ultra vires and void because the general words in s. 21 "in any case when the streets are thronged or liable to be obstructed" must be limited so as to be applicable to instances of particular and extraordinary occasions, and (per ROMER, L.J.) the six months' summer season could not be regarded as such a special occasion or event.

Teale v. Williams 78 J.P. 383 overruled.

Decision of VAISEY, J., (121 J.P. 571) affirmed on other grounds.

APPEAL by the defendants, Poole Corporation, from an order of VAISEY, J.

The plaintiffs, Brownsea Haven Properties, Ltd., who were the owners of a hotel in Poole, applied by originating summons for a declaration that an order dated Mar. 5, 1957, and made by the defendants in purported exercise of the powers conferred on them by s. 21 of the Town Police Clauses Act, 1847, was ultra vires and void. The effect of the order was to create a one-way traffic system in two adjoining streets in Poole for all vehicles for a period of six months from Apr. 19, 1957, to Oct. 19, 1957, inclusive. The purpose of making the order was to test the efficiency of the one-way traffic system in the two streets as a preliminary to an order establishing it under s. 46 (2) of the Road Traffic Act, 1930, as amended by s. 29 (4) of the Road and Rail Traffic Act, 1933. VAISEY, J., held

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that the order was ultra vires and void because, as s. 46 (2) of the Road Traffic Act, 1930, as amended, contemplated that one-way streets should be created only with the confirmation of the Minister of Transport, a temporary order under s. 21 of the Act of 1847, which did not require the confirmation of the Minister, could not be validly made for the purpose of trying out a one-way traffic system as a preliminary before making and applying for confirmation of an order under s. 46 (2) of the Act of 1930.

In the Court of Appeal, the defendants were represented by the Treasury Solicitor. The plaintiffs took the preliminary point that the Treasury Solicitor was not empowered to represent the defendants as the Crown had no interest in the subject-matter of the appeal. The plaintiffs in their notice under R.S.C., Ord. 58, r. 6, said that they would contend that the judgment of VAISEY, J., should be affirmed on the grounds set out in the judgment and on the further ground that the order of Mar. 5, 1957, did not prescribe any route to be observed by traffic within the meaning of s. 21 of the Act of 1847. With leave of the court the notice was amended by raising the further point that the power to make orders under s. 21 of the Act of 1847 was restricted to special occasions.

Denys B. Buckley and *J. L. Arnold* for the defendants, *Poole Corporation*.
Squibb, Q.C., and *J. L. Harman* for the plaintiffs.

Cur. adv. vult.

Dec. 16. The following judgments were read.

LORD EVERSHERD, M.R. (read by **ROMER, L.J.**): This is an appeal against a judgment of VAISEY, J., declaring ultra vires and void an order made by the defendants, *Poole Corporation*, on Mar. 5, 1957, under powers which they claim to be available to them under s. 21 of the Town Police Clauses Act, 1847. Omitting formal parts, the terms of that order, the intended effect of which was to make, for the period of six months specified therein, the thoroughfare described in the order what is commonly called a "one-way street", were as follows:

"Whereas the streets to which this order applies are during certain seasons of the year thronged and liable to be obstructed.

"Unless upon the direction or with permission of a police officer in uniform from Apr. 19, 1957, to Oct. 19, 1957 (both dates inclusive), the route to be observed by all vehicles in

"(i) Banks Road between its junction with Panorama Road shall be towards their south-western junction and

"(ii) Panorama Road shall be towards its north-eastern junction with Banks Road.

"For the purposes of this order 'vehicle' includes bicycles and similar machines whether mechanically propelled or not.

"All constables are hereby directed to enforce the provisions of this order."

Before counsel for the corporation could begin to open the appeal on their behalf, counsel for the plaintiff-respondents took a preliminary objection which, in the form as it was first presented, was that the instructions of counsel for the corporation came from a solicitor who had no practising certificate in accordance with the Solicitors Act, 1957. The real substance, however, of the objection was directed to the fact that the Treasury Solicitor (who, being in fact a member of the Bar, is incapable of obtaining a practising certificate) was representing the corporation for the purpose of the appeal. The office of Treasury Solicitor is

derived from the Revenue Solicitors' Act, 1828, s. 1. He normally acts for Her Majesty or for Ministers of the Crown or other persons in the service of Her Majesty; but he may also, in certain circumstances, be instructed by or on behalf of the Crown to offer his services to a private individual in the course of litigation and, if his services are accepted, may thenceforward act for such private individual. The circumstances which justify such instructions and such a result are that the Crown has an interest in the subject-matter of the litigation: see the decision of this court in *R. v. Archbishop of Canterbury* (1). So far there was no contest between counsel for both parties. It was, however, the contention of counsel for the plaintiffs that the Crown had, in truth, no interest whatever in the subject-matter of the present appeal, which was one exclusively between Poole Corporation, on the one hand, and the plaintiffs, who are owners of a property within the local jurisdiction of the corporation, on the other; and counsel sought particular support for his submission from the circumstance that the order of Mar. 5, 1957, had in any case expired on Oct. 19 last, so that (as he claimed) the only live issue between the plaintiffs and the corporation was that of the award by VAISEY, J., to the plaintiffs of the costs of the action.

After hearing arguments from counsel, we intimated that we were not disposed to accept the objection as fatal to the appeal in limine; and we proceeded to hear the substance of the appeal accordingly. In the result, I have for my part been strongly confirmed in the view which I had been earlier disposed to take, namely, that the Crown has in the present case an interest in the subject-matter amply sufficient to support and justify its intervention. In *R. v. Archbishop of Canterbury* (1) the question at issue had been whether, on the election of a bishop, objections could be put forward on doctrinal grounds after confirmation of the election by the archbishop, and the court had no difficulty in holding that the Crown had a sufficient interest in the matter to justify the Treasury Solicitor's appearance for and representation of the archbishop. No exposition is to be found in the judgments of what constitutes a sufficient "interest" for present purposes. Counsel for the corporation submitted that it sufficed if the Crown or some Minister of the Crown or perhaps the Treasury Solicitor himself asserted the existence of an "interest" in the Crown. The argument does not appear to have been advanced by the then Solicitor-General, Sir Edward Carson, in *R. v. Archbishop of Canterbury* (1), and the language, at any rate of ROMER, L.J., seems clearly to avoid so deciding. He said:

"Under those circumstances, the Crown, for what appear to me good and sufficient reasons, came to the conclusion that it was to the interest of the Crown that it should, at its own expense, defend on behalf of the archbishop."

Later in his judgment ROMER, L.J., said:

"It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action or proceeding against him, should be undertaken, and the Treasury Solicitor is delegated by the Treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor."

No doubt, in ninety-nine cases out of a hundred, the view of a Minister of the Crown that the Crown was "interested" in any given subject-matter would, at the least, strongly support the conclusion that it was; but I should not, as at present advised, be disposed to hold that in such cases the ipse dixit of a Minister

or his representative was itself conclusive. In the present case, however, I feel no doubt at all that the Crown has an "interest", according to the ordinary acceptance of that word, in the subject-matter in dispute. Traffic control is notoriously a matter of national concern; and the real question at issue in the action is whether a broad class of local authorities, of which the corporation are one, has, by virtue of the Act of 1847, power, of its own motion, to regulate traffic within the ambit of its jurisdiction by means of orders of the kind so far successfully impugned in this action; or whether such orders can only competently be made under the much more recent road traffic legislation which requires their confirmation by the Minister of Transport and Civil Aviation. In my judgment, it is impossible sensibly to deny that the Crown, and particularly the Minister of Transport and Civil Aviation, has an interest in that question. Nor can I accept the argument of counsel for the plaintiffs that the expiry of the corporation's order of Mar. 5, 1957, according to its terms, makes the matter purely academic or that the only "live issue" is one of costs, in which (as such) the Crown could legitimately have no interest at all. The question of the scope and availability to the corporation of s. 21 of the Act of 1847 for the purposes of traffic regulation remains, in my view, a "live issue", notwithstanding the expiry of the March order by effluxion of time. It is not in doubt that the corporation wish to avail themselves of the powers of the Act of 1847 (if they subsist) for the purposes of traffic regulation as occasion may require; and we were informed that the decision of the court below has similarly affected other municipal authorities. Put conversely, it is not suggested that the order of March, 1957, exhausted the intended invocation by the corporation of the powers of the Act of 1847 for regulating the traffic of Banks Road and Panorama Road, let alone other thoroughfares within their jurisdiction: still less that (as in *Sun Life Assurance Co. of Canada v. Jervis* (1)) the result of this appeal could be said to be a matter of indifference to the plaintiffs.

I turn, therefore, to the substance of the appeal itself. Section 21 of the Town Police Clauses Act, 1847 (of the powers conferred by which the corporation's recited order of March, 1957, purported to be an exercise) reads as follows:

"The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets, within the limits of the special Act, in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed, and may also give directions to the constables for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort; and every wilful breach of any such order shall be deemed a separate offence against this Act, and every person committing any such offence shall be liable to a penalty not exceeding 40s."

It was the contention of counsel for the plaintiffs, which they put in the forefront of their case in support of the conclusion of VAISEY, J., that the corporation's order, the declared intention and effect of which was to make of Banks Road and Panorama Road (as defined in the order) a "one-way street", was outside the scope of the section since, notwithstanding the express use therein of the five vital words, the order did not amount to an order for "the route to be observed" by vehicles as that phrase in the section ought properly to be interpreted. The argument of counsel for the plaintiffs was to the effect that the word "route" in the section was used, and used exclusively, in the same

(1) [1944] 1 All E.R. 469; [1944] A.C. 111.

sense as that in which it is used in phrases like "a bus route" or "a tram route" and signified the course or the street or streets used (or to be used) by vehicles in proceeding from one point to another, regardless of direction; that the phrase was not apt to mean or include merely a direction to be followed; and, more particularly, that an order "for the route to be observed" was never intended to mean or cover, and should not be taken to mean or cover, an order designed to give to a particular street or streets a special quality or characteristic, namely, such that any vehicle in the street or streets, whatever might be its point of entry or its destination, must move in the street in one direction only. In support of the argument, it was said, and said with some force, that the idea of "one-way streets" as a means of dealing with day-to-day traffic congestion was something not dreamt of in 1847; and counsel drew attention to the language of s. 46 of the Road Traffic Act, 1930, in which a distinction is drawn in the paragraphs of sub-s. (2) between the specification of routes to be followed by vehicles, on the one hand, and, on the other, the prohibition of the driving of vehicles on a specified road otherwise than in a specified direction. Finally, it was submitted that the inapplicability of the section to a "one-way street" order is shown by the terms of the present order itself, which, by straining the language of the section to achieve such a purpose, produces the result that, as a strict matter of language, a vehicle cannot turn out of Banks Road or Panorama Road into one or other of the side streets, but must pursue the stipulated direction, at least to the south-western junction of the two roads.

Notwithstanding the strong reliance placed by counsel for the plaintiffs on this part of their case (which was made the subject of their notice under R.S.C., Ord. 58, r. 6), I have felt unable to give to the essential words "the route to be observed" so strict and confined a meaning. Although it is, no doubt, true that the words may have been primarily intended—particularly having regard to their context and to the immediately following words "by all carts, carriages, horses, and persons"—to provide for such expedients as the temporary closing of certain streets or parts of streets and the total diversion of all traffic, including pedestrian, it does not seem to me that the words according to their ordinary and proper usage can be interpreted so as to exclude the ordering of traffic in a thoroughfare to observe one "direction" or "route" therein only. The word "route" is, after all, defined in the *SHORTER OXFORD ENGLISH DICTIONARY* as:

"A way, road, or course; a certain direction taken in travelling from one place to another . . ."

Moreover, if a total diversion of all traffic from a particular street or part of a street is comprehended, I do not see why, on the principle that the greater includes the less, there is not also included the diversion of that part only of the traffic that would otherwise go in one direction along it. The point is, in the end, a short one, and I hope I shall not be thought disrespectful of the plaintiffs' argument if I do not attempt further elaboration. In my judgment, the plaintiffs fail on this point to sustain the judgment under appeal.

It is, however, by no means the end of the case. The corporation's order which is challenged in these proceedings recites that the streets to which it applies are "during certain seasons of the year thronged and liable to be obstructed". The order then proceeds to make those streets one-way streets for twenty-four hours of the day during the six months' period from Apr. 19, 1957 (which was Good Friday) to Oct. 19, 1957. The words of the section which, according to the corporation, were applicable and justified the making of the order, were the words "and in any case when the streets are thronged and liable to be obstructed". Those words follow immediately the enumeration "in all

times of public processions, rejoicings, or illuminations", and the question emerged during the argument whether, on their proper construction in the context in which they appear, the words "in any case", etc., ought not to be confined to special events, that is, occasions strictly similar to public processions, rejoicings and illuminations, or, at most, to short periods of time when the ordinary day-to-day traffic conditions are liable to be dislocated or obstructed by crowds of pedestrians or streams of vehicles, and whether, therefore, the words ought to be treated as not apt or intended to cover the ordinary day-to-day traffic conditions in particular streets so as to provide authority for the making of "one-way street" orders (as counsel for the corporation admitted that his clients claimed to be entitled to do) for long or indefinite periods of time in the general interest of local traffic regulation. It became plain during the argument that the choice must lie between construing the general words as limited to special or extraordinary occasions of obstruction, whether or not strictly similar to the preceding examples, on the one hand, and, on the other, giving them inevitably the wide significance claimed by counsel for the corporation. No middle course—for example, such as to authorise the making of orders for experimental periods only—appeared possible; and if the latter view is correct, the result may appear remarkable. Parliament, in the Road Traffic Act, 1930, thought it right, by the amended terms of s. 46 which I have earlier cited, to require that proposals for making one-way street regulations should be confirmed by the Minister of Transport. Yet, if counsel for the corporation is right, there exists and had always existed a parallel or corresponding statutory power exercisable without any ministerial control. It was this result which plainly impressed VAISEY, J., and constrained him to decide, as he did, against the validity of the order. If, on its true construction, s. 21 of the Act of 1847 has the wide ambit for which counsel for the corporation contends, then the court must so decide, notwithstanding the strangeness of the result. The court, however, will not, in my judgment, be astute to pronounce in favour of such a conclusion, and certainly not the less so since modern traffic conditions calling for one-way street regulation could not have been in the contemplation of the legislation of 1847. The motor traffic to be found in Banks Road and Panorama Road, Poole, "in certain seasons of the year", could not have been within the mischief which the Act of 1847 was designed to remedy.

The plaintiffs do not appear in the court below to have argued for a limitation of the general words to particular or extraordinary occasions; nor had they raised the point in their notice under R.S.C., Ord. 58, r. 6. They, no doubt, rightly felt that the point was concluded against them before VAISEY, J., by certain decisions of the Divisional Court later mentioned. Counsel for the plaintiffs told us that in this court also he had felt those cases to be a serious obstacle, since the earliest of them had been decided over forty years ago; and he had also felt somewhat constrained by the fact that the same general words appeared in the Metropolitan Police Act, 1839 (as well as in some private Acts), in a context which made the argument for limitation of their effect more difficult. After discussion before us, however, counsel for the plaintiffs asked for leave to amend his notice so as specifically to raise the point, and, since counsel for the corporation did not oppose, we gave leave accordingly.

I propose to express my view on the point in the first instance, treating it as res integra and without regard to the Divisional Court decisions. So treating it, I have come to the conclusion that in the context in which they appear the words "in any case" ought to be treated as intended only to cover "cases" of the same class or "genus" as the three preceding instances, that is, either "cases"

strictly similar to "public processions, rejoicings, or illuminations", or, alternatively, "cases" of obstruction or dislocation of a special, or particular, and extraordinary kind; and the words ought not, therefore, to be treated as covering the circumstances of ordinary day-to-day traffic conditions.

The books provide numerous examples of the application of the so-called "ejusdem generis" rule of construction. I take for a statement of the appropriate principle the following passages from the judgment of FARWELL, L.J., in *Tillmanns & Co. v. S. S. Knutsford, Ltd.* (1), a case in which this court held the rule to apply so as to limit the phrase "in consequence of war, disturbance or any other cause" to causes of the same kind as the two named instances. The learned lord justice, after observing that there was no room for the application of the rule unless there was a class or category, proceeded:

"But when there is a clear category followed by words which are not clear, unambiguous general words, it would violate a settled rule of construction to strike out and render unmeaning two words which were presumably inserted for the purpose of having some meaning."

Later in his judgment he said:

"Now, if the words in this case had been 'in consequence of war, disturbance, or any cause whatsoever, whether similar to those preceding or not', there would have been no room for argument, because there would be no real category at all: it is universality, and not a category; it is the whole range of causes. But, inasmuch as you have simply the words 'any other cause', which are ambiguous, then the rule does apply. The rule may be taken as stated by LORD TENTERDEN, C.J., in *Sandiman v. Breach* (2): 'Where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis'. The same rule was applied in *R. v. Cleworth* (3), which turned on the construction of a statute enacting that no tradesman, artificer, workman, labourer or other person whatsoever should do or exercise any worldly labour, etc., on the Lord's Day. COCKBURN, C.J., said: 'Then there is a general expression "other person whatsoever"; but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the legislature'. CROMPTON, J., and BLACKBURN, J., both agreed. If, therefore, there is a category, then the rules, which have come down to us from former generations and which still remain in full force, will apply . . ."

The impression which the language of the present section clearly forms on my mind is that, within the principle above stated, the general words "in any case", etc., were intended to be confined and should be confined to cases within the "genus" or category of which public processions, rejoicings and illuminations are specific instances. The three instances suffice, in my judgment, to constitute a genus which, even if not confined to instances strictly similar to those three, may be stated as special occasions (not necessarily limited to a single day) when the ordinary day-to-day use of street or highways is, or is liable to be, obstructed or dislocated by substantial numbers of persons, on foot or in vehicles, participating as spectators or otherwise in the occasion. It is quite true that the word "other" does not occur before the word "case" as, in the authorities, it commonly does in the general words following the particular

(1) [1908] 2 K.B. 385; on appeal, sub nom. *S. S. Knutsford, Ltd. v. Tillmanns & Co.*, [1908] A.C. 406.

(2) (1827), 7 B. & C. 96.

(3) (1864), 28 J.P. 261; 4 B. & S. 927.

instances; but I cannot find that the presence of that word has been regarded as essential to the application of the rule, as it is, in my judgment, irrelevant to its principle. No reliance is put on the presence of the word in *Tillmanns & Co. v. S. S. Knutsford, Ltd.* (1) or in the older authorities therein cited; and see *R. v. Wallis* (2) referred to by ROMER, L.J., in the judgment which he is about to deliver and which I have had the advantage of seeing. As a matter of English, it may indeed be said that the word "other" would tend rather against the limitation of the general words. Nevertheless, counsel for the corporation put the absence of the word "other" in the forefront of his argument. He might even, as I understood him, have been disposed to concede, had the phrase been "and in any other case", etc., that the general words so introduced should be limited to instances ejusdem generis as public processions, etc. But he argued that the relevant part of the section should be treated as applicable to two distinct sets of circumstances, namely: (i) public processions, rejoicings or illuminations (of which throngs and obstructions were not essentially characteristic), and (ii) "any case", in which streets were thronged or liable to be obstructed. It is, however, in my judgment, impossible to accept the view that Parliament were legislating in regard to "times of public processions, rejoicings, or illuminations" as a distinct and confined class of occasion with which throngs and street obstructions were not necessarily involved. The power conferred is one for ordering "the route to be observed . . . and . . . for . . . preventing . . . obstruction of the streets". It seems to me, therefore, impossible to treat the three specified examples of public processions, etc. (and, if necessary, I would treat the word "public" as applicable to all three) otherwise than as instances when the streets are thronged and liable to be obstructed. If this is right, then in my judgment it is impossible to construe the general words which follow in any sense different from that which they would bear if the word "other" appeared before the word "case". Even if there be two distinct classes of occasion or event (as counsel for the corporation contended) so that the class introduced by the words "in any case" were not to be interpreted as ejusdem generis with the three events "public processions, rejoicings, or illuminations", still, the use of the word "case" seems to me naturally apt, and in the context only apt, to refer to particular or special occasions or events, and not (as would have been, for example, such a word as "circumstances") to mean the ordinarily recurring or day-to-day conditions of particular thoroughfares. If, indeed, the latter had been intended, nothing would have been easier than for Parliament to have said so, or at any rate to use a simpler and wider phrase such as "and whenever". In the end, the question may resolve itself into no more than that of determining, on the true construction of the section, what are the limits (if any) of the "category" introduced by the words "in any case": and in my judgment the category is a limited one which, on any view of it, excludes the circumstances of the six months' period of April to October. I, therefore, if I am free to do so in light of the decided cases, would hold that the general words must be limited so as to be applicable to instances only of particular and extraordinary occasions, a view which appears to me to be in better conformity with the general tenor or purpose of the section, having regard particularly to the traffic conditions of 1847.

I have expressed my view so far on this matter on the assumption that the question is novel. The assumption is, however, not correct, having regard to

(1) [1908] 2 K.B. 385; on appeal, sub. nom. *S. S. Knutsford, Ltd. v. Tillmanns & Co.*, [1908] A.C. 406.

(2) (1793), 5 Term Rep. 375.

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the Divisional Court decisions earlier mentioned. Our attention was directed to five such decisions. The first is *Dudderidge v. Rawlings* (1), decided in December, 1912, before RIDLEY, COLERIDGE and BANKES, JJ. The case was one in which Bristol Corporation had made an order under s. 21 of the Act of 1847, which, after reciting that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered the constables to control traffic at cross-roads in those streets by what we now know as ordinary point-duty directions. The appellant was a taxicab driver who declined to obey the signals of a constable operating under the order and had been fined accordingly as for an offence within the terms of the section. The case in the Divisional Court turned on the narrow point (decided adversely to the appellant) whether disobedience to the constable amounted to a breach of the corporation's order or only to disregard of the constable's signal, which would not itself be an offence under the section. The question of the scope and meaning of the words "in any case", etc., with which we are concerned, does not appear to have been raised or debated at all.

The matter is, however, otherwise with the second case, *Teale v. Williams* (2) decided in April, 1914. There Eastbourne Corporation had made an order under the section which, after reciting, like the Bristol order, that certain streets were thronged and liable to be obstructed between certain hours on weekdays, ordered (among other things) that no hawker should use the said streets during such hours for the sale of specified goods from trucks or barrows, and gave directions to the police to enforce such order. On a prosecution of the respondent, a hawker, for breach of the order, the local justices had held that the section, on its true construction, only authorised an order to deal with extraordinary occasions of obstruction. On appeal to the Divisional Court this decision was reversed. It appears from the leading judgment of AVORY, J., that some part of the argument had turned on the submission that the hawker was doing no more than using the King's highway in the ordinary course. It is, however, clear that the point now before us was argued and expressly decided in a sense contrary to that which has commenced itself to me. AVORY, J., said:

"The question is whether the words 'in any case' mean that they may make such an order applicable to any street which is usually thronged or usually liable to be obstructed. In my opinion that is the plain meaning of the words, and they are not intended to be limited to cases of extraordinary occasions of obstruction similar to those of public processions, rejoicings, or illuminations."

It is, however, no less clear that ROWLATT, J., did not himself share this view, although he did not in the end dissent. He said:

"However the words are wide, and as my brethren do not feel the difficulty which I feel I do not desire to dissent, especially as their construction is from the public point of view much the more beneficial."

SHEARMAN, J., on the other hand, went even further than AVORY, J., and, since his judgment was quoted in full and approved expressly by LORD HEWART, C.J., in *Etherington v. Carter* (3), I venture to set it out here at length. He said:

"I am of the same opinion. The only question left to the court in this case is whether the words of s. 21 authorise the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street makes such a regulation necessary in the opinion of the local authority.

(1) (1912), 77 J.P. 167.

(2) 78 J.P. 383; [1914] 3 K.B. 395.

(3) [1937] 2 All E.R. 528.

In my judgment the words are amply wide enough to confer such a power. The section begins with a general reference to the regulation of traffic—'The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction'. Those are the opening words. Then it goes on to give two or three particular occasions—'in all times of public processions, rejoicings, or illuminations'. Having given those three special occasions it then uses the widest possible words 'and in any case when the streets are thronged or liable to be obstructed'. I cannot entertain much doubt that 'in any case' means in any case and not in a few special cases. It appears to me that although the statute is not very aptly worded the intention is merely to give a few examples and then to confer the widest possible power to be exercised by the local authority."

The next case, *Edwards v. Wanstall* (1) came before LORD HEWART, C.J., SWIFT and BRANSON, JJ., in November, 1929. The facts of the case were for practical purposes identical with those in *Teale v. Williams* (2), and that fact, together with the further fact that fifteen and a half years had passed since *Teale v. Williams* (2) had been decided, are matters to which I shall attach some importance later in this judgment. In *Edwards v. Wanstall* (1) the local justices of Herne Bay appear to have taken the point (which had not been raised in *Teale v. Williams* (2)) that an order for an indefinite period, even though otherwise within the scope of s. 21 of the Act of 1847, was in truth a bye-law which required confirmation under the Public Health Act, 1875; and that, since the order in question had not been so confirmed, it was invalid. The Divisional Court took the view that the case was directly covered by *Teale v. Williams* (2) and allowed the appeal accordingly. LORD HEWART, C.J., in following *Teale v. Williams* (2), is not reported as having expressed any view of his own; and BRANSON, J., confined himself to concurrence with his brethren. SWIFT, J., however, though also of the opinion that *Teale v. Williams* (2) was binding, expressed "a good deal of sympathy with the doubts which were expressed by ROWLATT, J.," in the earlier case. SWIFT, J., found difficulty in persuading himself that it was, in truth, intended that the section in question should extend to the making of "a permanent order closing a number of streets to particular classes of persons for every day of the week".

The fourth case is *Etherington v. Carter* (3), before LORD HEWART, C.J., HUMPHREYS and SINGLETON, JJ. This case also, like the two preceding ones, concerned the making of an order under the section for the prohibition of sales by hawkers in certain streets. In this case the streets were in the immediate neighbourhood of Windsor Castle, and the order made differed from the orders in the two preceding cases in that its operation was not limited to specified hours during the day. There can be no doubt that on this occasion LORD HEWART, C.J., did express his own personal opinion, which was in strong support of the earlier decisions. Indeed, he went so far as to cite at length the judgment of SHEARMAN, J., in *Teale v. Williams* (2) and to express his own entire agreement with that judgment. As regards the absence of any limit as to hours, the learned Lord Chief Justice thought the point immaterial, since it would have no practical significance during the hours when the hawker would, in the ordinary course, be plying his trade. On the other hand, it may be added that HUMPHREYS, J., expressly reserved his view as to the validity of an order made without limitation

(1) (1929), 94 J.P. 51.

(2) 78 J.P. 383; [1914] 3 K.B. 395.

(3) [1937] 2 All E.R. 528.

as to times or hours in a case in which the evidence showed the obstruction to occur or to be likely to occur only during certain periods.

The last of the five cases is *Waring v. Wheatley* (1), which came before LORD GODDARD, C.J., and SLADE and DEVLIN, JJ. I need not, however, take time on this case, for it turned solely on the circumstance that the information had omitted the word "wilfully", and, therefore, did not disclose the offence named in s. 21 of the Act of 1847. Although other points were taken in the argument, the judgment of LORD GODDARD, C.J. (with which his two brethren agreed), is limited to the single one of the absence of the word "wilfully".

From these cases it is, to my mind, clear that *Teale v. Williams* (2) involved the rejection of any limitation in scope of the general words "in any case", etc., to specific occasions, and that that decision has since been followed and treated as binding by the Divisional Court in the few later cases in which the point has been raised. The cases are not, of course, binding on this court; but there is well-established authority for the view that a decision of long standing, on the basis of which many persons will in the course of time have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision. The matter was recently considered exhaustively in *Robinson Brothers (Brewers), Ltd. v. Houghton & Chester-le-Street Assessment Committee* (3), affirmed. In that case the members of this court, having concluded that the decision on a question of rating pronounced some forty years previously by a Divisional Court in *White v. Bradford-on-Avon Assessment Committee* (4) was plainly wrong, overruled it accordingly, although the earlier decision had, without doubt, been frequently acted on in rating matters in the meantime, and although no judicial doubt had previously been cast on its correctness. GREER, L.J., cited in his judgment the well-known passage from the speech of LORD LOREBURN, L.C., in *West Ham Union v. Edmonton Union* (5):

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

GREER, L.J., however, was not deterred from overruling the earlier Divisional Court case by reason of the absence of any "disclosure of weakness in the reasoning" of the Divisional Court decision in later judgments. Nor do I think that LORD LOREBURN's language should be treated, or has in practice been treated, as laying it down that the power to overrule should never be exercised unless all the circumstances referred to by LORD LOREBURN are present and their conditions satisfied.

In my judgment, and with all respect to the contrary opinions expressed in the cited cases, I think that, in so far as those cases depended on a conclusion that the words "in any case", etc., are unlimited by the context in which they appear, they cannot be supported. Having given the matter my best consideration, I feel it my duty to state my own opinion that the conclusion arrived at by SHEARMAN, J., and adopted by LORD HEWART, C.J., that the words quoted

(1) (1951), 115 J.P. 630.

(2) 78 J.P. 383; [1914] 3 K.B. 395.

(3) 101 J.P. 321; [1937] 2 All E.R. 298; affd. H.L., 102 J.P. 313; [1938] 2 All E.R. 79.

(4) 62 J.P. 533; [1898] 2 Q.B. 630.

(5) [1908] 72 J.P. 9; A.C. 1.

were used in the widest possible sense so as to authorise the making of general orders for traffic regulation wherever the ordinary traffic in a street made such regulation necessary in the opinion of the local authority, is clearly wrong; and I am comforted and confirmed in this opinion by the similar view which clearly appealed to ROWLATT, J., and SWIFT, J. Although I am unable to agree that the words "in any case", etc., were intended or are apt to confer the widest possible powers on the local authority, I must not be taken to be saying that the decisions in the cited cases cannot properly be otherwise supported. It was conceded by counsel for both parties that the powers contained in the latter part of the section are not necessarily limited by the language in the earlier part—in other words, that the local authority may, by the section be empowered (in addition to the authority conferred by the earlier part of the section) to give directions to the local constables for keeping order and preventing obstruction of streets which would comprehend the subject-matters of the Divisional Court cases. The words "other places of public resort" are exceedingly wide, and plainly cannot, in my judgment, be confined to places of the same kind as "theatres", a word which of itself cannot form a category. It seems to me, therefore, that the decision in the fourth of the cited cases, namely, *Etherington v. Carter* (1), could well have been supported in reliance on this part of the section since, as was observed in the judgment of LORD HEWART, C.J., the environs of Windsor Castle are places to which very large numbers of the public from distances far and near are apt to resort. The full circumstances relating to the relevant streets in Eastbourne and Herne Bay are not fully stated in *Teale v. Williams* (2) and *Edwards v. Wanstall* (3), but it may well be that these decisions could be similarly supported on their facts under the second half of the section.

I have referred already to the fact that *Edwards v. Wanstall* (3), of which the facts were almost identical with those in *Teale v. Williams* (2), came before the Divisional Court fifteen and a half years after *Teale v. Williams* (2); from which it may not unreasonably be inferred that no great number of other similar orders had in the meantime been made. Further, since 1930 and the coming into operation of the Road Traffic Act, 1930, the requisite police powers would appear to be covered by s. 49 of that Act—if and to the extent that they cannot be supported (as I have suggested) by the terms of the second part of s. 21 of the Town Police Clauses Act, 1847.

In the circumstances, I am not satisfied that either injustice or inconvenience would be caused by giving effect now to the conclusion which I have formed on the words "and in any case", etc., in s. 21 of the Act of 1847. Counsel for the corporation was not (and could not, in the nature of things, have been) fully instructed as to the extent to which the section had been invoked by other local authorities for the making of orders comparable to that in the present case. I am not satisfied that the section has or can have been relied on to any substantial extent for the making of "one-way street" orders for indefinite periods of time. The traffic conditions which today require or justify such measures of traffic regulation are recent phenomena. In making provision expressly directed to such a form of traffic regulation, Parliament in 1933 thought it right to require the safeguard of confirmation by the Minister. The court ought not, in my judgment, to arrive readily at a conclusion in conflict with this declared parliamentary intention, and certainly should not be inclined to regard the

(1) [1937] 2 All E.R. 528.

(2) 78 J.P. 383; [1914] 3 K.B. 395.

(3) (1929), 94 J.P. 51.

opposite view as unjust. Having regard particularly, therefore, to the views of ROWLATT, J., and SWIFT, J., and also to the facts (i) that the decision in *Teale v. Williams* (1), so far as it rested on the Act of 1847, substantially lost its significance sixteen years later with the passing of the Act of 1930, (ii) that the decision cannot be regarded as one which has stood "for a long period of time" as that phrase was used, for example, by LORD BUCKMASTER in *Bourne v. Keane* (2), (iii) that the decision itself and those which followed it may be capable of being supported on other grounds, and (iv) that the validity of the application of the section in the Act of 1847 to circumstances such as those in the present case has never, in fact, been previously considered by any court, I think that the Divisional Court decisions ought to be disapproved in so far as they rested on the unlimited construction of the words "and in any case", etc.

The point was also suggested in argument by the plaintiffs that the corporation's order of March, 1957, fell outside the authority of s. 21, on the ground that, after reciting the thronging and liability to obstruction of the relevant streets "during certain seasons of the year", it proceeded to apply the "one-way" traffic regulation for the period from Apr. 19 to Oct. 19, a period which was not shown to correspond with any of the "seasons of the year" previously mentioned: and also on the further ground that, in any case, the thronging or obstruction sought to be prevented was not shown to have occurred or to be apprehended for twenty-four hours of all the days and nights of the period of operation of the order. To this point, if open to the plaintiffs, the observations of HUMPHREYS, J., in *Etherington v. Carter* (3) are relevant. Counsel for the corporation took the objection that the point had not been taken before VAISEY, J., and was not raised in the plaintiffs' notice under R.S.C., Ord. 58, r. 6, and that (if it had been so taken or raised) evidence could have been directed to it. In the circumstances, I do not propose to say anything more on the point. For the reasons which I have endeavoured to state, I think that this appeal should be dismissed.

ROMER, L.J.: I agree. As this appeal proceeded on its course it became quite apparent that the preliminary objection of counsel for the plaintiffs to the appearance of counsel for the corporation on the instructions of the Treasury Solicitor was altogether untenable. I am not prepared to hold, as counsel for the corporation at one stage of his argument invited us to do, that the mere ipse dixit of a Minister of the Crown that he or his department has an interest in legal proceedings to which neither he nor the Crown is a party precludes the court from inquiring whether that is so or not, when objection is taken to the intervention of the Treasury Solicitor. There is a passage in the judgment of SIR RICHARD HENN COLLINS, M.R., in *R. v. Archbishop of Canterbury* (4) which lends some support to that view, but, as the Solicitor-General, Sir Edward Carson, had not relied on the point in argument, there is no reason to suppose that SIR RICHARD HENN COLLINS, M.R., was intending to decide it; and, as a mere obiter dictum, it was at variance with the observations of ROMER, L.J., in the course of his judgment in that case. Nevertheless, it is quite clear, in my opinion, that it is a matter of real concern to the Minister of Transport and Civil Aviation, and, therefore, to the Crown, if a question arises, as it does in the present case, as to the comparative powers of traffic control conferred by the Town Police Clauses Act, 1847, and the Road Traffic Act, 1930,

(1) 78 J.P. 383; [1914] 3 K.B. 395.

(2) [1919] A.C. 815.

(3) [1937] 2 All E.R. 528.

(4) [1903] 1 K.B. 289.

respectively. Nor can I accept the contention of counsel for the plaintiffs that, as the corporation's order, which is challenged in these proceedings, expired some time since, the only issue remaining is as to the costs of the hearing below, in which, admittedly, the Crown is in no way interested. The decision of VAISEY, J., was that the order was ultra vires and void and he made a declaration to that effect; and the practical result of that decision, so long as it stands, is that the corporation cannot make a similar order in the future. To say that they could do so in theory is to take an unrealistic view of the matter. The corporation want to know, for their future guidance, whether the judge was right or wrong in saying that they acted beyond their powers in making the order, and in my judgment they are entitled to come to this court for the purpose of finding out.

On the main issue, the learned judge based his decision in favour of the plaintiffs on the view that, although s. 21 of the Town Police Clauses Act, 1847, was not repealed by the Road Traffic Act, 1930, it was not open to the corporation to use the powers conferred by s. 21, without any local inquiry or restriction, in an experimental way pending an order under s. 46 of the Act of 1930 being confirmed by the Minister. At the hearing before this court, counsel for the plaintiffs, whilst, of course, relying on and supporting the basis of the learned judge's decision, put their case in the first instance in a somewhat different way. The corporation's order of Mar. 5, 1957, has been stated by LORD EVERSHED, M.R., and I will not repeat its terms; but the first point taken by the plaintiffs is that it was not an order "for the route to be observed" by the traffic which was affected by it, and was, therefore, not such an order as is authorised by s. 21 of The Act of 1847. "Route", they say, is a line between two termini; it may be a roadway or a sea way (Mr. Harman, junior counsel for the plaintiffs, mentioned the short sea route by way of illustration) or an air way, but, whichever it is, it possesses the characteristics of linking two termini and being available to traffic proceeding in either direction. The plaintiffs say that neither of these characteristics is to be found in the route which the corporation purported to prescribe by their order and which is nothing more nor less than a one-way circuit. In my judgment, this is too narrow a construction of the relevant language of s. 21. The plaintiffs' contemplation of a "route" within this language would be something in the nature of a by-pass. I quite agree that it would include a by-pass, but I am unable to see why it should be limited to a by-pass or any other way in which traffic is permitted to move in both directions. Many by-passes have dual carriage ways and I should have thought that each carriage way could fairly be described as a route to be observed by the traffic which wished to travel in the permitted direction. Section 21 in dealing with traffic obstruction and with means of preventing it; and in that context the words "route to be observed" postulate the diversion of traffic along a way or ways to be prescribed and the direction which the traffic is to take. So, in the order under consideration, the route to be observed by all traffic (e.g., traffic from Bournemouth) wishing to get from the north-east junction of Banks Road and Panorama Road to the south-west junction is by way of Banks Road, and the route for all traffic wishing to get from the south-west junction to the north-east junction is by way of Panorama Road. The fact that these two routes, when taken together, constitute a one-way circuit and that all traffic entering the circuit by a side road must turn right or left, as the case may be, does not appear to me to be relevant. The truth of the matter is that, unless the word "route" in the section excludes the idea of one-way traffic, the plaintiffs' contention on this point cannot, as it seems to me, succeed; and in my judgment there is no sufficient ground for such exclusion.

The next question which I propose to consider is whether the words "and in any case" in s. 21, following as they do on a reference to "all times of public processions, rejoicings, or illuminations", are to be limited in some, and if so what, way, or whether they should receive a general and uncontrolled construction. If the words had been "in any *other* case" it could scarcely be contended, I should have thought, that such a construction should be attributed to them, for the resulting universality would render wholly otiose the reference to public processions, etc.; and, indeed, it was largely on the omission of the word "other" that counsel for the corporation founded his argument in favour of an unlimited construction. To justify, said counsel, the cutting down of the normal meaning of words it is necessary to find some ambiguity in the language. Such an ambiguity arises, or may arise, from the word "other" when following on specific examples of a genus, and in such instances the ejusdem generis principle will usually be applied, for otherwise the specific examples would be redundant. But, said counsel, the word "other" does not appear in s. 21, and this, said he, is not surprising, for "public processions, rejoicings, or illuminations" do not constitute a genus at all.

It is quite true that, in most of the cases in which the ejusdem generis principle has been applied to statutory language, the stated examples of a genus have been followed by the word "other". There are, however, cases to be found in the books where the principle has been applied notwithstanding the absence of the word "other": see, for example, *R. v. Wallis* (1), where the Court of King's Bench applied it to the words "cities, towns corporate, boroughs, and places" in s. 1 of the statute 9 Anne c. 20, in relation to persons intruding into public offices. In the course of his judgment in that case, LORD KENYON, C.J., said:

"... the word 'places', in the Act only extends to offices in places of the same kind with those before enumerated; otherwise the legislature would have used only one compendious word, which would have included places of every denomination. In one of the cases cited, FOSTER, J., observed, that the Statute of Anne was drawn by POWELL, J., and that accurate judge would not have introduced all these different words, if the last alone would have been sufficient."

The other members of the court took a similar view.

The doctrine of ejusdem generis is only a part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine, it is difficult to see what difference it can make whether the word "other" is or is not used, provided—and this is essential—that the examples which have been given are referable to a clearly ascertainable genus. It is, accordingly, vital to ascertain whether the three examples which precede the words "and in any case" in s. 21 all possess a common characteristic or quality. In my opinion, and having regard to the context in which they appear, they plainly do. Whether or not the word "public" in the section governs not only "processions" but "rejoicings" and "illuminations" as well, so that all three activities were envisaged as possessing a public element, it is not necessary to decide, although I think on the whole that it does. The object of s. 21, as is stated by the introductory words of the section, is to confer "Power to make orders for preventing obstructions in the streets during public processions, etc."; not generally, it is to be observed, but on particular occasions. The body of the section enumerates three such particular occasions and it is quite

manifest that each of them is calculated to attract a crowd of persons who collect together; and a crowd of persons who collect together is, in turn, calculated to obstruct the streets in which it gathers. From this I deduce that the element which is common to all of the three instances enumerated in the section is that they only happen from time to time, but, when they do occur, they are likely to attract a crowd of people whose presence will inevitably, in a great or lesser degree, obstruct the streets. I must confess that I entertain no doubt, having heard elaborate argument on the point, that the words "and in any case" are limited to events which possess the common characteristics to which I have referred; that is to say, they are limited to special occasions which, by their nature, are likely to attract a crowd. They may be short (e.g., a public oration) or they may be comparatively long (e.g., coronation celebrations); but they must be occasions of a special kind as distinct from the everyday life of a town. The contrary argument which counsel for the corporation submitted to us substitutes (in effect) "whenever" for the words "in any case when" and deprives the words "in all times of public processions, rejoicings, or illuminations" of any effect at all; and I must reject a contention which involves these results. Further than this, it appears to me that, if the argument is sound, there was very little object in empowering the commissioners (as the section does) to

"... give directions to the constables for . . . preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort . . ."

—for, on the corporation's contention, *all* streets (including these streets) where obstruction is ordinarily to be expected could be made the subject of an order under the earlier part of the section.

Thinking, as I clearly do, that the words "and in any case" should receive the limited interpretation which I have stated, the next question is whether effect can properly be given to this view having regard to the earlier decisions of the Divisional Court in which a contrary opinion was expressed. These authorities have been fully reviewed in the judgment of LORD EVERSHER, M.R., and I will not refer to them in any detail again. It cannot, of course, be disputed that in *Teale v. Williams* (1) the court declined to apply the ejusdem generis principle to the words now under consideration, or that this decision was followed in *Edwards v. Wanstall* (2), and in *Etherington v. Carter* (3). These decisions are not binding on this court, but they are naturally entitled to the weight and respect which all decisions of the Divisional Court receive; and this court would normally be extremely hesitant to overrule them. I am, however, impressed by four considerations which in their totality are sufficient, in my judgment, to remove this case from the principle stare decisis. (i) ROWLATT, J., in *Teale v. Williams* (1), and SWIFT, J., in *Edwards v. Wanstall* (2), expressed themselves in terms which, as it seems to me, show that those cases would have been decided differently had those two learned judges been left to arrive at their own unaided conclusions. (ii) Breaches of s. 21 are visited with penal consequences. In my judgment, it is not right that persons should suffer such consequences for failing to observe orders which a local authority has no power to make; and if this court is of opinion that the powers conferred by s. 21 of the Act of 1847 are, in fact, narrower than they have hitherto been held to be, it is its bounden duty to say so. (iii) The overruling

(1) 78 J.P. 383; [1914] 3 K.B. 395.

(2) (1929), 94 J.P. 51.

(3) [1937] 2 All E.R. 528.

of the previous decisions will in no way affect property rights or disturb titles. (iv) The powers of making orders such as that now in dispute have been for many years and still are exercisable by local authorities by virtue of s. 46 of the Road Traffic Act, 1930, subject only to ministerial approval. These considerations, when taken together, fully justify this court, in my judgment, in substituting its own view of the meaning of s. 21 for that which commended itself to the majority, but not all, of the judges who decided the earlier cases. The stare decisis principle was much debated in the well-known case of *Bourne v. Keane* (1), but I can find nothing in the speeches of any of their Lordships in that case, or in any other decision bearing on this subject, which, in view of the considerations which I have mentioned, render it either undesirable or improper for this court to give effect to its own conclusions.

On the footing, then, that (contrary to his contention) the ejusdem generis principle should be applied, counsel for the corporation next submitted that the six months' holiday season at Poole can fairly be regarded as an "event" comparable to public processions, rejoicings and illuminations. He said, quite rightly, that an event need not be limited in duration to one day but may well extend over several days, and he suggested that the summer season at a popular seaside resort may properly be regarded as a special event or occasion equally with a prolonged public holiday or a visit by units of the Home Fleet. In my opinion it would not be right to accept this contention. There is nothing special about the summer season except that it is the time when most people take their holiday, and I cannot agree that that constitutes a special event for any relevant purpose. It is a question of degree whether an occasion is so much outside the general run of affairs in the life of a seaside resort as to be regarded as beyond the ordinary; and I cannot think that the summer holiday period, recurring year after year and lasting from April to October, can reasonably be so regarded.

On the views above expressed, the appeal fails, and it is unnecessary to consider whether it fails also on the ground that the order which Poole Corporation made was ultra vires as being of a merely experimental nature. I feel considerable sympathy with the learned judge's conclusions on this point, to which he was led by the comparative provisions of s. 21 of the Act of 1847 and s. 46 of the Road Traffic Act, 1930, respectively. However, it is the fact that whilst certain of the provisions of the earlier Act were repealed by the later one, s. 21 was left undisturbed; and it is, therefore, a little difficult, perhaps, to say that the corporation could be acting ultra vires if they exercised statutory powers which remained vested in them under and by virtue of s. 21. It is not necessary, however, to express any concluded opinion on this matter because the appeal, in my judgment, fails for the other reasons which I have already indicated.

ORMEROD, L.J.: I agree that this appeal should be dismissed. I have had the opportunity of reading the judgments delivered by LORD EVERSHED, M.R., and ROMER, L.J., and I am in full agreement with the reasons given by them for dismissing the plaintiffs' preliminary objection. Nor do I wish to add anything to what has been said on the question whether an order made in pursuance of s. 21 of the Town Police Clauses Act, 1847, prescribing the direction in which traffic shall move in certain streets, is within the power given to the authorities to make orders "for the route to be observed by all carts," etc. In my judgment, on the plain meaning of the words, the powers given by the section are amply wide enough to include such an order.

The important question in this appeal, as I see it, is whether, on the proper construction of the section, the words "and in any case when the streets are thronged", etc., should bear an unrestricted meaning, or whether by reason of the *ejusdem generis* rule their meaning should be restricted by the preceding words "in all times of public processions, rejoicings, or illuminations". This question was the subject of judicial consideration as long ago as 1914, when in *Teale v. Williams* (1) it was decided by the Divisional Court that an order prohibiting hawkers from using certain streets during certain hours for the sale of certain specified goods from trucks or barrows was within the powers given by the section. The order made no reference to any special occasion, but merely recited that certain streets were thronged and liable to be obstructed on weekdays. AVORY, J., expressed the view that on the plain meaning of the words of the section the authorities were enabled to make an order applicable to any street which was usually thronged or usually liable to be obstructed. ROWLATT, J., did not dissent from this view, although he expressed himself as feeling some difficulty in accepting it. SHEARMAN, J., on the other hand, went further than AVORY, J., and expressed the view that the words were amply wide enough to authorise the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street made such a regulation necessary in the opinion of the local authority. *Teale v. Williams* (1) was followed by other cases in the Divisional Court to which reference has been made in the judgments already delivered, and to which, therefore, I do not propose to refer, except to note that in *Edwards v. Wanstall* (2), which came before LORD HEWART, C.J., SWIFT and BRANSON, JJ. SWIFT, J., expressed the view that, although he was bound by the decision in *Teale v. Williams* (1), he had "a good deal of sympathy with the doubts which were expressed by ROWLATT, J. . . ." It should also be noted that in *Etherington v. Carter* (3), LORD HEWART, C.J., not only expressed the view that he was bound by the decision of *Teale v. Williams* (1), but also said that he was in entire agreement with the view expressed by SHEARMAN, J.

The question which now falls to be considered is whether these cases can be considered to be rightly decided, depending, as they do, on the view that the words "in any case", etc., bear an unrestricted meaning. I have come to the conclusion that they cannot be so considered. In my view, in the context in which they appear in the section, the meaning of the words is limited by the preceding words "in all times of public processions, rejoicings, or illuminations". It is a well established rule of construction that, if there are words in a section referring to particular instances from which a genus may properly be derived, then the generality of the words following will be restricted to that genus unless the context shows the contrary. Counsel for the corporation argued in this case that no genus could be derived from the particular instances given in this section. His contention is that the section deals with two classes of cases, the one being the class set out in the instances mentioned, the other the wider class implied in the words "in any case", etc. I find it difficult to accept this view. "Public processions, rejoicings, or illuminations" may well be cases when the police require to have powers to regulate the traffic, for the very good reason that they are cases when the streets are liable to be thronged or obstructed. In my view, the type of case with which the section is intended to deal is something in the

(1) 78 J.P. 383; [1914] 3 K.B. 395.

(2) (1929), 94 J.P. 51.

(3) [1937] 2 All E.R. 528.

nature of an "occasion" when the streets, for reasons other than the normal day-to-day usage, are likely to contain more than the usual amount of traffic, whether on foot or otherwise. Such an occasion might well, of course, last more than a single day, but could not, in my view, be held to cover a substantial part of the year when the press of traffic, although heavy and liable from time to time to cause obstructions, is due to no more unusual a cause than the advent of summer.

In these circumstances, I agree that this appeal should be dismissed, even though it means overruling the decisions of the Divisional Court in *Teale v. Williams* (1) and the subsequent cases, always bearing in mind that this court will not lightly overrule decisions which have been standing for a number of years, and on which many local authorities may have acted. It does appear that prior to the Road Traffic Act, 1930, the powers of the police for regulating traffic were mainly, if not wholly, derived from the section under consideration, and that, in consequence, many orders were made under the section which were, no doubt, for the benefit and convenience of the public. The police now have ample powers under the Road Traffic Acts, and no inconvenience to the public is likely to be caused by the decision that the order in this case is ultra vires. For these reasons, I, too, would dismiss this appeal.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Cripps, Harries, Hall & Co.*

F.G.

(1) 78 J.P. 383; [1914] 3 K.B. 395.

NORWICH CONSISTORY COURT

(THE CHANCELLOR: J. H. ELLISON, ESQ.)

August 20, September 27, 28, October 21, November 15, 1957

NORFOLK COUNTY COUNCIL v. KNIGHTS AND OTHERS

Highway—Widening—Use of part of burial ground—Faculty—Re-interment of human remains—Common grave.

Where a local authority sought in a consistory court a licence and faculty to enable them to use part of a cemetery for the widening of the highway, the scheme involving interference with a number of graves and the exhumation and re-interment of human remains, certain unidentified remains being re-interred in a common grave,

HELD: there was no general rule or doctrine of the Church of England to the effect that the dead, once buried in consecrated ground, should for ever take absolute priority over the compelling needs of the living, nor was there any doctrinal objection to the re-interment of large numbers of unidentified remains in a common grave, but in the present case no such weighty reasons had been proved as would justify the granting of a faculty.

PETITION by the Norfolk County Council for a licence and faculty to enable them to use consecrated land in the parish of Caister-on-Sea for the purpose of a road widening scheme.

The council, as the local highway authority, proposed to take a strip of land along the length of Caister-on-Sea cemetery adjacent to the Ormesby road, to widen that road by about four feet six inches, and to make a footpath between the widened road and the new boundary of the cemetery. The scheme involved the interference with a large number of graves and the exhumation and subsequent re-interment of some four hundred human remains in land adjoining,

but on the other side of, the cemetery. Those remains which were readily identifiable would be re-interred in separate graves, but a certain number of remains could not be identified from records and it was proposed that these should be buried in a large communal grave. During March, 1954, the petitioners had published notices of the scheme in local newspapers, but did not invite anyone to state an objection. On Nov. 13, 1956, the Caister-on-Sea parochial church council passed (by twelve votes to seven) a resolution objecting to the scheme, although the land in fact formed no part of the churchyard, but formed part of a duly consecrated cemetery under the management and control of the Caister-on-Sea joint burial committee.

The petitioners founded their case on alleged traffic danger. In their petition dated Feb. 4, 1957, they alleged:

"... the road carries very heavy traffic which at the peak of the summer season exceeds nine thousand vehicles a day. The minimum width of the road is nineteen feet six inches which is barely sufficient for two large vehicles to pass."

They alleged that there was no footpath for pedestrians and that it was not possible for them to step out of the way of traffic and that twenty-seven accidents had occurred in the last nine years. They then described the proposed plan for the provision of a twenty-four foot carriage-way with a new footpath on the cemetery side only, at a cost in the region of £3,724, which they would defray subject to any government grants. The petitioners then referred in their petition to the exhumations, movement of headstones, footstones, monuments, etc., including a lifeboat memorial, and their lay-out in the new piece of land which they proposed to give to the joint burial committee. It was also alleged that the scheme had received the approval of the joint burial committee. The diocesan advisory committee studied the proposals and stamped the petition with their recommendation.

Each of the representative parties opponent (except one) filed an act on petition setting out their objections. Each act on petition was drawn in long-hand by the litigant himself. In various permutations and combinations they raised five main issues. First, one and all denied the number of accidents alleged. Secondly, they contended that exhumation and removal of human remains was an unsuitable and unbecoming procedure at any time, and in particular when on the large scale proposed. Thirdly, it was contended that the lifeboat memorial was essentially a national memorial as well as being of local importance and that it should not be removed. Fourthly, on the question of pedestrians, they said in effect that if certain limited improvements were made many more people would use the footpath through the cemetery. Fifthly, on the question of the carriage-way, they said that it was feasible to widen the road at the southern end. They set out their suggestions which, they said, would overcome the risks and dangers about which the petitioners might feel anxious without recourse to disturbing the graves in the cemetery. The Caister-on-Sea joint burial committee in their act on petition confined themselves to the fourth and fifth points and produced an alternative scheme.

By an order dated Mar. 7, 1957, citation was directed by notices on the church door and by advertisements in local newspapers. A large number of persons entered an appearance to oppose the petition, as also did the joint burial committee. Subsequently the court issued of its own motion a summons requiring all the persons concerned to attend in open court and be heard primarily for the purpose of determining how a case involving so many parties might best be dealt with, and as a result by an order dated Aug. 20, 1957, the twenty-seven

individual parties opponent were formed into seven groups and each group was ordered to be represented by a "representative party opponent". It was also agreed and ordered by consent that future pleadings, directions and orders should be deemed to have been served on each representative party opponent by affixing one copy to the door of the parish church and by sending another copy to the incumbent for inspection at all times at the rectory. After the close of the pleadings the representative parties opponent instructed the same solicitor, by whom they were represented at the hearing although on the first day of the hearing one of the seven groups withdrew from the proceedings for personal reasons.

D. E. H. James (Norwich), solicitor for the petitioners.

R. C. Killin (Norwich), solicitor for the representative parties opponent.

The joint burial committee were represented by a member nominated to act on their behalf.

Cur. adv. vult.

Nov. 15. **MR. CHANCELLOR ELLISON** read a judgment in which he referred to the features of the site which was the subject-matter of the proceedings and to the pleadings and continued: I think that this would be a convenient stage for me to make one or two general observations. The contention of the parties opponent that exhumation and re-interment is an unsuitable or unseemly procedure was developed during the evidence of some of them into the much wider contention that once land was consecrated it should never be interfered with in any circumstances and that re-interment of unidentified remains in a communal grave should not be permitted. I think that this proposition needs some qualification. Consecration has of course a spiritual significance, but the act of consecration is essentially judicial and becomes manifest when, pursuant to a petition to consecrate and after due consideration, the ordinary pronounces a sentence dedicating and setting apart the lands from all common and profane uses. Once consecrated the land falls within the jurisdiction of the ordinary exercised through the medium of the consistory court. Subsequently, consecration can only be rendered nugatory or its effect taken away by legislative means such as an Act of Parliament. Although the consistory court is an ecclesiastical court it is nevertheless a court of the realm and one of the Queen's courts and not infrequently it is called on to do justice between the church authorities and others of the Queen's subjects. The court has long assumed a jurisdiction to permit within its discretion the user of consecrated land for purposes such as road widening schemes where it has been satisfied that it is necessary for public good that such user should be allowed, and many are the examples in the text-books and reports. In my judgment, there is no doctrinal or other rule which says in effect that the dead once buried in consecrated land shall for ever after take absolute priority over the compelling needs of the living. If I were satisfied in any case that there were a substantial need based on danger to the living or other cogent reasons why a road should be widened at the expense of using consecrated land it would be my duty to grant a faculty to enable that to be done. Under powers granted by the Faculty Jurisdiction Rules, 1939, this court of its own motion summoned the Archdeacon of Norwich, the Venerable Robert Meiklejohn, LL.B., B.D., to assist on these and other aspects. In his evidence the archdeacon expressed the opinion that there was no general rule or doctrine of the Church of England against exhumation and subsequent re-interment of human remains elsewhere. He emphasised, however, that in his opinion this course should only be taken when it was proved to be necessary and in other cases it should be avoided. On the question of

interment in a communal grave he again knew of no doctrinal objection and he was unable to see any other practical way of interring large numbers of unidentified remains. I accept those views entirely. In my judgment, they are sound. Although communal burial may seem distasteful to some, yet that practice has long been adopted, particularly in cases of national disaster. It followed often as a consequence after heavy bombing raids during the war, and in cases of serious aircraft accidents, and where, for one reason or another, the remains have not been identifiable communal interment has taken place. I think that it is most unfortunate that this question of communal re-interment should ever have arisen and it is certainly no fault of the petitioners that they have been obliged to put it forward in their proposals. It seems that when the petitioners made inquiries there were no proper records of the names of those buried in eighty graves out of two hundred. Since this case started I understand that a further thirty have been identified, but one witness thought there were still more remains not yet accounted for. It seems that at some not too recent period the joint burial committee were grossly negligent and allowed their records to get into a complete muddle. I am told that none of the present officers is in any way responsible, so I will say no more than that such events are unfortunate and as a result the petitioners have been put to a great deal of unnecessary trouble. It is the parishioners' own responsibility for they elected the parish council which virtually constitutes the burial committee and any criticisms that have in consequence been levelled against the petitioners by reason of their lack of details as to identity of graves are wholly unjustified. Finally, the archdeacon also said that whilst he and the diocesan authorities were very sympathetic to all persons concerned they did not feel that there was any cause why they should intervene in these proceedings.

That leads me to my next observation, namely, that although the parochial church council expressed an opinion at their meeting to which I have referred, neither they, nor the rector, nor the churchwardens nor in fact any church body at all are parties to these proceedings. The rector was called as a witness but otherwise the church authorities have played no part at all. The issues lie essentially between a local authority on the one hand, and the burial committee, which to all intents and purposes is the same as the parish council, together with a number of resident parishioners, on the other hand. This is an unusual state of affairs in an ecclesiastical court and bearing in mind the nature of the issues it is not surprising that the evidence followed a pattern more usually found in public planning inquiries or inquiries arising out of the proposed compulsory acquisition of land.

[THE CHANCELLOR considered the evidence and concluded:] I have come to the conclusion, and I am left in no doubt about it, that the petitioners have not made out a sufficient case and they have not proved to my satisfaction that such weighty reasons exist on the grounds of danger, past, present, or potential, or for that matter any sufficiently weighty ground which would justify my granting a faculty to permit the large upheaval which would follow.

The application accordingly failed and the petition would be dismissed with court costs to be paid by the Norfolk County Council, the council paying the costs of all parties except those of the joint burial committee.

Order accordingly.

Solicitors: *D. E. H. James, Norwich; Ruddock, Middleton & Killin, Norwich.*
G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., DEVLIN and PEARSON, JJ.)

December 10, 1957

R. v. IBRAHIM AND OTHERS

Magistrate—Summary trial or committal for trial—Election by defence for summary trial—Opening of case—Decision of magistrate to commit—No evidence heard—Magistrates' Courts Act, 1952 (15 and 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 24.

A magistrate does not begin to try an indictable offence summarily within the meaning of s. 24 of the Magistrates' Courts Act, 1952, until he begins to hear evidence.

Where, therefore, in accordance with the wishes of the prosecution and defence a magistrate agreed to proceed with a view to the summary trial of an indictable offence, but, after hearing the opening of the prosecution, said that he would not try the case summarily and committed the defendants for trial.

HELD, that as the magistrate had decided to commit for trial before he heard any evidence, he was entitled to change his mind at that stage of the proceedings and the committal for trial was valid.

APPEALS against conviction.

The appellants were convicted at the Central Criminal Court before the Common Serjeant of wounding with intent and were each sentenced to nine months' imprisonment. The appellants were originally charged at a metropolitan magistrate's court with unlawful wounding, which offence, although indictable, the magistrate might try summarily. The prosecution agreed to summary trial, and the appellants elected that the case should be tried summarily. The magistrate proceeded with a view to a summary trial, but, after hearing the opening of the prosecution, said that he would not try the case summarily and he committed the appellants for trial. The offence of wounding with intent was included in the indictment, as being an offence disclosed in the depositions within the meaning of s. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. It was contended for the appellants that the committal for trial was invalid on the ground that the appellants had elected to be tried summarily when they were brought before the magistrate, and he had "begun to try" the case, and, therefore, under s. 24 of the Magistrates' Courts Act, 1952, he was bound to continue the trial.

J. O. Haines for the appellants.

J. B. R. Hazan for the Crown.

GODDARD, C.J.: The appellants appeal to this court on the ground that they were wrongly committed for trial, and the whole point put before the court is that they had elected summary trial when they were brought before the learned magistrate and that the learned magistrate had begun the hearing of the case, and, therefore, under s. 24 of the Magistrates' Courts Act, 1952, was bound to continue summary trial and could not change his mind and commit for trial.

When the appellants were brought before the magistrate on a charge of unlawful wounding, which is an offence which, although indictable, a magistrate may try summarily with the consent of the accused, the facts were outlined to the magistrate and the prosecution consented that the case should be tried summarily. Thereupon the magistrate followed the procedure under s. 19 of the Act. After the charge had been read to the appellants they were asked if they elected to be tried summarily, and they answered that they did, and then

the facts were opened on behalf of the prosecution to the learned magistrate. When he heard the full facts he said he was not going to try the case summarily, because it was too serious, and he committed them for trial. A count under s. 18 of the Offences against the Person Act, 1861, for wounding with intent, that is, feloniously wounding, was subsequently included in the indictment. The whole question put to us is whether the decision to commit for trial was not too late and whether under s. 24 of the Act of 1952 the magistrate was not bound to continue the summary hearing of the case.

Speaking for myself, I think this point is entirely decided by a decision of the Divisional Court, which we should naturally follow except for the most compelling reasons. Whether it is technically binding on this court I need not stay to inquire, but certainly in the past this court has been accustomed to follow decisions of the Divisional Court, just as the Divisional Court has been accustomed to follow decisions of this court. This case is entirely covered by *R. v. Craske Ex p. Metropolitan Police Commissioner* (1), which was decided only in February, 1957. That case undoubtedly decided that the magistrate had not begun to try the case within the meaning of s. 24 of the Magistrates' Courts Act, 1952, until he had begun to hear evidence. *Craske's* case (1) was a case in which a defendant had been charged with an offence before a learned metropolitan magistrate and had elected summary trial. He then came before the magistrate on remand. The case had not been proceeded with on the day when he made his election, and on remand he asked for leave to withdraw his election and asked to go for trial, and it was contended that the learned magistrate had no power to allow him to do so. The Divisional Court held that the magistrate had power to allow him to do so, and that the defendant could withdraw his election because the magistrate had not begun the trial. The court said in the plainest possible terms that the magistrate did not begin to try the case until he had begun to hear the evidence, and that was the construction which the court put upon s. 24 of the Magistrates' Courts Act, 1952. I do not think myself that we get much assistance by considering what happens where the trial takes place on indictment, because there is a particular code which enables indictable offences to be tried summarily in magistrates' courts, and the position is, of course, different, and different considerations arise from those which apply to the case where the prisoner is indicted and is tried on indictment. We need not consider, in my opinion, for the purposes of this case, whether on a trial at assizes or quarter sessions the trial begins when counsel opens the case. But I am satisfied, even apart from *Craske's* case (1) that under the provisions of ss. 19 and 24 of the Magistrates' Courts Act the trial does not begin until the magistrate begins to hear the evidence, and there is a very good reason for that view, because it is not for the defendant to say whether he will be tried summarily. The defendant can say: "I will not be tried summarily", but he cannot say: "I will be tried summarily" if the offence is indictable. The question whether the defendant should be tried summarily or on indictment is a matter for the court to decide. It may be that the court sometimes will say: "Here is a charge. We will start on the basis that there is to be a trial on indictment, and we will consider when we have heard some of the evidence whether we will treat it as an indictable or summary offence". That, no doubt, could happen, but it may happen that the prosecution and the defence quite properly put their heads together and say: "We shall be quite content with a summary trial", but when the magistrate hears something about the facts he says: "I am not going to try this case; it is a serious case and I shall commit this case for trial".

(1) 121 J.P. 502; [1957] 2 All E.R. 772.

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I am content to base my decision in this case on the footing that it was decided quite unequivocally in *Craske's* case (1) that until the magistrate begins to hear evidence, s. 24 does not apply. We are dealing here with a code which obtains in courts where magistrates can sit either as a court of summary jurisdiction or as examining magistrates, and we have to construe ss. 19 and 24. The Divisional Court has construed s. 24 in the way that I have indicated, and, in my opinion, it makes no difference in a magistrate's court that an advocate or the prosecutor may have begun to inform the magistrate of the evidence which he intends to call. I do not think that thereby the magistrate has begun to try the case. He has not begun to try the case till he begins to hear evidence. In this case he decided to commit for trial before he heard any evidence, only after hearing the facts in the opening. For these reasons, I think the point fails and these convictions must be affirmed.

DEVLIN, J.: It seems to me that there is only one point in this case, though counsel has sought to distinguish *Craske's* case (1). In *Craske's* case (1) the Divisional Court held that the magistrate had not begun to try the case within the meaning of s. 24 merely because he had received the plea of the accused man. In this case it can be said that the magistrate had gone further; he had not only received the plea but had heard the opening speech for the prosecution. Is that a valid ground of distinction? In my judgment, it is not. In *Craske's* case (1) both the Lord Chief Justice and **BYRNE, J.**, although they were dealing with a case which had not gone further than the plea, expressed the view that the magistrate did not begin to try the case until he had begun to hear the evidence. One has to bear in mind that in considering trial in this connexion we are considering it, as my Lord has pointed out, in connexion with a special code of procedure. I can quite appreciate that it may be said that a trial begins immediately after arraignment. In some contexts that may be true or, in the case of a jury trial, it may begin when the accused is put in charge of the jury and the opening speech follows that, but we are considering the matter in its place in s. 24 as one of the provisions relating to a rather complicated and elaborate code. Once one concedes, as one has to having regard to *Craske's* case (1), that the trial does not begin immediately after arraignment, there being no question of putting anybody in charge of the jury, I agree with my Lord that the right point to take is the point at which the magistrate begins to hear the evidence.

PEARSON, J.: I agree. Counsel advanced the argument under s. 19 (5) taken by itself that at a certain stage of the proceedings, that is to say after the court had decided under s. 19 (2) that it would proceed with a view to summary trial and after certain steps had been taken and after the accused had consented to summary trial, then the words "shall proceed to the summary trial of the information" were to be understood in a literal sense as thereupon compelling the court to proceed to the summary trial and precluding the court from inquiring into the information as examining justices. That was an argument which could certainly be put forward on that provision taken by itself, but then one has in the same Act s. 24, which says:

"Except as provided in s. 18 (5) of this Act, a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices."

I have not been able to find that s. 24 can have any meaning or apply to any situation unless it applies to the situations contemplated by s. 19 (5) and s. 20 (4).

Moreover, it was decided in the case which has been mentioned, *R. v. Craske* (1), that s. 19 (5) has to be read together with s. 24. Therefore, until the summary trial of the information has begun, the court is still at liberty to inquire into the information as examining justices. I entirely agree with what has been said with regard to the meaning of the beginning of the trial of the information in this particular statute, and it does not necessarily apply to the position under other statutes or in relation to other proceedings. I therefore agree with the judgment proposed.

Appeals dismissed.

Solicitors: *Registrar of Court of Criminal Appeal*; A. W. Kemp, Solicitor, Scotland Yard.

T.R.F.B.

(1) 121 J.P. 502; [1957] 2 All E.R. 772.

CENTRAL CRIMINAL COURT

(GLYN-JONES, J.)

November 11, 25, 26, 27, 28, 29, December 2, 3, 4, 5, 6, 9, 10, 1957

R. v. SMITH AND OTHERS

Criminal Law—Indictment—Joinder of counts—Separate indictments for manslaughter and other offences—Evidence on each indictment substantially similar—Bill of indictment granted including count for manslaughter and other offences.

The first two prisoners were indicted for manslaughter, and in a second indictment they were charged with three other prisoners on counts of stealing or receiving a lorry laden with lead. Almost the whole of the evidence in support of each indictment would, if each indictment had been heard separately, have had to be called again on the other.

HELD, in the circumstances it was desirable in the interests of justice and in the public interest that all the charges laid against the five prisoners should be disposed of in one trial, and, it not being proper to amend either indictment by including in it the charges contained in the other, a bill of indictment would be granted against all the prisoners in which a charge of manslaughter against the first two prisoners would be included.

TRIAL on indictment.

The first two prisoners, Henry Thomas Smith and Robert Semaine, were charged in the first indictment with the manslaughter of George Benjamin Day who was alleged to have received fatal injuries while assisting them and the other three prisoners in unloading a lorry laden with lead which had been stolen. In a second indictment, containing four counts, Smith and Semaine were charged with stealing the lorry and receiving stolen property, Candler was charged with being an accessory after the fact to stealing and receiving stolen property and E. G. Richardson and C. W. Richardson were charged with receiving stolen property. Apart from the medical witnesses on the charge of manslaughter the witnesses on each indictment were the same. After the trial had proceeded five days the charge of manslaughter was withdrawn from the jury, and in the result Smith and Semaine were convicted of stealing the lorry and its contents and were sentenced; Candler was convicted of being an accessory after the fact to the stealing and receiving and was sentenced; E. G. Richardson and C. W. Richardson were found not guilty and were discharged. The case is only reported on the issue of the joining of the separate indictments for manslaughter and other offences.

R. E. Seaton, E. J. P. Cussen and Miss P. G. Coles for the Crown.

R. A. Kaye for Smith and Semaine.

P. A. G. Rawlinson for Candler.

J. C. G. Burge and D. W. T. Price for E. G. Richardson.

Victor Durand and R. M. G. Simpson for C. W. Richardson.

Nov. 11. **GLYN-JONES, J.:** In this case depositions were taken before the examining magistrates and at the close of the hearing the accused, Smith and Semaine, were committed to stand their trial on a charge of the manslaughter of George Benjamin Day, and all the defendants, including Smith and Semaine, were committed to stand their trial on charges of stealing or receiving a lorry or the lead which was loaded on it.

Separate indictments were preferred against them in this court; an indictment against Smith and Semaine for manslaughter, and a separate indictment against them and the others containing various counts charging stealing or receiving. Having inquired from counsel for the prosecution I learned that if those two indictments were tried in separate trials, as they would have to be since they were separate indictments, it would be necessary for the prosecution to call in each trial almost the whole evidence which would have to be called in the other trial. In particular, on the trial of Smith and Semaine and others for stealing the lorry and lead or for receiving the lead knowing it to have been stolen, the whole of the evidence on which the prosecution would ask the jury to convict on the manslaughter charge would have to be called.

It seemed to me that it would be a great waste of time and money that all that evidence should be called twice over, and I formed the opinion that it would be desirable in the interests of justice and in the public interest that all the matters alleged against these defendants should be heard and disposed of in one trial, but a technical difficulty arises. It was not, as I saw it, possible to amend the indictment for manslaughter by including the other defendants in the indictment which charges the stealing and receiving; nor had I thought it right to amend the indictment for stealing and receiving by adding the charge of manslaughter, and it therefore seemed to me that the proper course was, having read the depositions, to grant a bill of indictment against all these defendants, in which there shall be included a charge of manslaughter against Smith and Semaine. That has been done, and this trial will proceed on the voluntary bill.

A further question arises whether or not the provisions of the Criminal Justice Act, 1925, s. 13 (3), apply so as to enable the depositions of those witnesses who were conditionally bound over to be read on this trial. I have come to the conclusion that this is a trial of persons who have been committed for trial for the offences, in the case of Smith and Semaine of manslaughter and of stealing or receiving, as the case may be, and in the case of the others of receiving. The trial will take place, therefore, on the charges on which these defendants have all been committed. Each has heard the evidence given by the witnesses conditionally bound over, each has had his opportunity to cross-examine, and I rule that in this case, all the defendants having been committed for trial for the offences with which they are now charged, the deposition of the witness Detective Sergeant Merry may now be read. Any other decision in my opinion would cause a wholly unjustified waste of public time and money.

Solicitors: *Director of Public Prosecutions; R. G. Freeman & Co.; Prothero & Prothero (for Candler); Brian Rees & Co.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(BARRY, J.)

December 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 1957

BARBER v. MANCHESTER REGIONAL HOSPITAL BOARD AND
ANOTHER

Hospital—Employment of consultant surgeon—Contract subject to terms and conditions of service issued by Minister—Termination of employment by regional hospital board—Non-compliance with terms of service—Remedies—Measure of damages.

The plaintiff at the time of the establishment of the National Health Service on July 5, 1948, was employed as a consultant surgeon at a hospital administered by a local authority which, after July 5, 1948, came under the administration of the first defendant, a regional hospital board, on behalf of the Minister of Health. On July 1, 1949, the board, by a circular, offered to continue the plaintiff's appointment, subject to the terms and conditions of service of hospital medical staff stated in a memorandum issued by the Minister on June 7, 1949. By cl. 16 of these terms a consultant who considered that his appointment was being unfairly terminated by a regional hospital board was entitled to send a full statement of the facts to the Minister, who was to obtain the written view of the board concerned and place the case before a professional committee for their advice, in the light of which he would decide whether to confirm the termination of service, or to direct reinstatement, or to arrange some third solution agreeable to the parties concerned. This procedure was to be completed before a board's decision to terminate a consultant's services was carried into effect. The plaintiff continued in the employment of the board as hospital consultant. In January, 1952, the board purported to determine the plaintiff's employment as from Apr. 30, 1952, and the plaintiff, considering his dismissal unfair, caused the Minister to be informed of the facts, but it was maintained on behalf of the Minister that no appeal lay, and the Minister, therefore, reached no decision under cl. 16. The plaintiff brought an action against the board and the Minister, in which he claimed declarations that his employment with the board was subject to the terms and conditions of service issued by the Minister, and that it was never validly determined. He also claimed damages for breach of contract or wrongful dismissal and, as against the Minister, a declaration that, in failing to comply with cl. 16, the Minister acted in breach of his statutory duty under the National Health Service Act, 1946.

HELD: (i) a declaration would be granted against the Minister that, in failing to comply with cl. 16 of the terms and conditions of service, he had acted in breach of his statutory duty under the National Health Service Act, 1946.

(ii) the termination of the plaintiff's services by the board was a breach of the board's contractual obligations to him since his contract was governed by cl. 16 of the terms and conditions of service issued by the Minister and that clause had not been complied with.

(iii) the plaintiff was not entitled to a declaration that his contract with the board had never been validly determined because his contract was one between master and servant, and, therefore, his only remedy was recovery of damages for breach of contract (dictum of LORD KEITH OF AVONHOLM in *Vine v. National Dock Labour Board*, [1956] 3 All E.R. at p. 948, applied), the measure of damages being his loss of salary for the period during which he would have been employed by the board if his appeal under cl. 16 had been rightly decided.

ACTION by Alexander Howard Barber, the plaintiff, against the Manchester Regional Hospital Board (hereinafter referred to as "the board") and the Minister of Health (hereinafter referred to as "the Minister"), the defendants, arising out of the termination by the board of the plaintiff's appointment as a consultant at Boundary Park Hospital, Oldham, which was a hospital administered by the board, on Apr. 30, 1952. By his statement of claim, the plaintiff claimed:—against both defendants (i) a declaration that his employment with the board was subject to the Terms and Conditions of Service of Hospital Medical

and Dental Staff (England and Wales) (hereinafter referred to as "the terms and conditions of service") which were issued by the Minister on June 7, 1949; against the board (ii) a declaration that his employment with the board was never validly determined; (iii) payment of salary at the rate of £2,375 per annum from May 1, 1952, to the date of the writ in the action; (iv) damages for breach of contract; and, alternatively, (v) damages for wrongful dismissal; and against the Minister, (vi) a declaration that the Minister, in failing to comply with cl. 16 of the terms and conditions of service, had acted wrongfully and in breach of his statutory duty under the National Health Service Act, 1946. The plaintiff further alleged that, in purporting to exercise their statutory power to terminate his employment, the board and the Minister acted *mala fide* in breach of their duty.

At all material times immediately prior to July 5, 1948 (the date when the Act of 1946 came into force), the plaintiff was employed by Oldham Borough Council as visiting surgeon in charge of the obstetrical and gynaecological departments of Boundary Park Hospital, Oldham, which was then owned and administered by the borough council. He also carried on a relatively small private practice, but devoted the greater part of his skill and time to the hospital. By s. 6 (2) of the Act of 1946, the hospital was transferred to, and became vested in, the Minister on July 5, 1948. By s. 12 of the Act, it became the duty of the board, subject to and in accordance with regulations and directions made by the Minister, to administer, on behalf of the Minister, the hospital and specialist services provided in its area, and to appoint officers required to be employed at hospitals other than teaching hospitals. Boundary Park Hospital came within the area administered by the board, and by s. 14 (1) of the Act of 1946, all officers who were employed for the purposes of the hospital became officers of the board. By the National Health Service (Transfer of Officers and Compensation) Regulations, 1948 (S.I. 1948 No. 1475), reg. 4, it was provided that officers who, immediately before July 5, 1948, were employed solely or mainly at or for the purposes of any hospital which was transferred to the Minister under the Act of 1946 should, on that day, be transferred to and become officers of the regional hospital board for the area in which the hospital was situated. Regulation 4 drew no distinction between whole-time and part-time officers, and, accordingly, the plaintiff, although classified as a part-time officer under the Act of 1946 because he carried on a private practice, was a transferred officer within reg. 4, being employed wholly or mainly at Boundary Park Hospital on July 5, 1948, and after that date he was employed by the board on the same terms as those which were applicable to his employment prior to July 5, 1948. Owing to an administrative error, the board, for some months after July 5, 1948, thought that the plaintiff was a whole-time officer, but the senior medical administrative officer of the board was always fully aware of the plaintiff's position.

In a circular letter dated July 1, 1949, which was sent by the board to the plaintiff, the board said (in para. 1 of the letter) that it now had in preparation the permanent contracts which it would "shortly offer to all whole-time practitioners now engaged in the hospital service". In para. 2 of the letter it was stated that the permanent contracts would be

"... on the basis of the terms and conditions of service agreed between the Ministry of Health and the medical and dental professions and detailed in the Supplement to the British Medical Journal of June 11, 1949..."

and that a further communication would be addressed to the plaintiff shortly. The letter further stated that

"In the meantime, this letter is to inform you that pending settlement of the permanent contracts the duties of your present post will be continued with effect from July 5, 1949, in the grade of specialist of full staff and consultant status and subject to the terms and conditions of service above referred to."

The plaintiff continued to serve the board after receiving the letter, and thereafter the board regarded the letter as governing the terms of the plaintiff's employment with it and relied on it in making adjustments in the plaintiff's remuneration (as stated in letters written by the treasurer of the board to the plaintiff on Aug. 22, 1950, and Nov. 15, 1950, respectively) was fixed at £2,375 per annum from July 5, 1948. Clause 16 of the terms and conditions of service provided:

"Where a consultant considers that his appointment is being unfairly terminated by a board, he shall be entitled to send a full statement of the facts to the Minister, who will obtain the written views of the board concerned and place the case before a professional committee . . . for their advice . . . In the light of their advice the Minister may confirm the termination of services, or direct reinstatement, or arrange some third solution agreeable to the parties concerned, such as re-employment in a different post. This procedure shall be completed before the board's decision to terminate the consultant's appointment is carried into effect."

In a letter dated Mar. 20, 1950, the board offered the plaintiff a permanent contract as a consultant "to replace the existing interim contract", and stated that the terms and conditions of service of the contract would be those agreed between the profession and the Ministry of Health, viz., those issued by the Minister on June 7, 1949, as amended, and that the form of the contract would be based on the amended model form agreed by the profession. The plaintiff did not accept this offer, as he did not consider that the number of sessions a week which were being offered to him were sufficient in view of the amount of work which he did at the hospital. The plaintiff was required to attend a meeting of the board's disciplinary sub-committee on Dec. 13, 1951, and was informed that, if he failed to sign the offered contract by Jan. 14, 1952, the board would assume that he was not prepared to accept a contract on the terms which the board was prepared to offer. The plaintiff, considering that he was being unfairly treated, caused his solicitors to report the facts of the case to the Minister, and on Jan. 14, 1952, there was an interview between the Minister's representative and a member of the firm of solicitors.

By a letter dated Jan. 23, 1952, the board purported to terminate the plaintiff's employment from Apr. 30, 1952. The facts of the case were put before the Minister, on the plaintiff's behalf, in a letter dated Feb. 6, 1952, and written by the member of Parliament for Oldham West (Mr. Hale). The Minister, however, being of opinion that the terms and conditions of service did not apply to the plaintiff's employment, did not comply with the provisions of cl. 16, the case was never referred to a professional committee and the Minister did not reach a decision under cl. 16. The board were of the same opinion as the Minister and purported to terminate the plaintiff's appointment although the provisions of cl. 16 had not been complied with.

The defendants contended that the terms and conditions of service were never incorporated as part of the plaintiff's contract of employment, and, alternatively, that, if they were, cl. 16 thereof was not incorporated. They further contended that, if cl. 16 did form part of the contract, the plaintiff could not rely on it as

he failed to send a full statement of the facts of his case to the Minister as provided in cl. 16. The defendants also denied that they had acted mala fide in their relationship with the plaintiff.

Scott Henderson, Q.C., and A. C. Munro Kerr for the plaintiff.

Foster, Q.C., Molony, Q.C., and Garfitt for the defendants.

BARRY, J., having stated the facts and referred to the correspondence, continued: It being admitted that the actual, or the purported, termination of the plaintiff's appointment was carried into effect before completion of the procedure laid down in cl. 16 of the terms and conditions of service, the first question for my consideration is whether or not that clause was incorporated in the contract under which the plaintiff was serving the regional hospital board as a consultant on the date when his services were terminated. After the appointed day, there can, I think, be no doubt that the plaintiff entered into the regional hospital board's employment under terms similar to those which were applicable to his contract before the appointed day with the Oldham Borough Council. If nothing further had been done, and no further contractual arrangements had been made, there is a great deal to be said in favour of the view of the Ministry of Health that the terms and conditions of service would have had no application until the plaintiff had entered into a new contract with the regional hospital board in which those terms and conditions were incorporated. In the present case I am entirely satisfied that the plaintiff did enter into a new contract with the regional hospital board on the terms indicated in their letter of July 1, 1949, from which it is clear that from that date or from July 5, 1949, four days later, the plaintiff was being offered a continued service with the regional hospital board "subject to the terms and conditions of service above referred to", which were the terms and conditions issued by the Minister on June 7, 1949, and reprinted for the whole medical profession in the issue of the *British Medical Journal* for June 11, 1949.

The plaintiff continued to serve the regional hospital board after the receipt of this letter, and by so doing I am satisfied that he must be deemed impliedly to have accepted the offer which it contained. I wholly reject the argument that this letter had no effect because it purported to refer to whole-time officers. The plaintiff was plainly a transferred officer. There was not, at any time, any possible doubt on that point. As a transferred officer his position was, as I see it, identical with that of a whole-time transferred officer, except, when the terms and conditions of service came into force, with regard to remuneration, a part-time officer being, of course, remunerated on a different basis from that applying to whole-time officers. Whether by mistake or otherwise, the regional hospital board did in fact address this letter to the plaintiff, and after its own administrative mistake had been rectified it never suggested that this letter was not to be regarded as governing the plaintiff's terms of employment. Indeed, it more than once relied on the terms and conditions of service in order to adjust the plaintiff's salary in various directions. In this connexion one cannot forget the Minister's direction which is printed in full in the *British Medical Journal*:

"Remuneration and conditions of service are interdependent and the application retrospectively of the former should ideally be accompanied by the application retrospectively of the latter."

The second submission of counsel for the regional hospital board, as I understand it, was to this effect. If, contrary to his submission, any of the terms and conditions were incorporated in this contract, it does not mean that they became part of the contract in the sense that the applicable terms and conditions became

terms of the contract between the plaintiff and the regional hospital board. As I understood his argument, the phrase "subject to the terms and conditions of service" should only be regarded as meaning that the terms and conditions would regulate the future relationship between the plaintiff and the regional hospital board as regards leave and other such matters, and would ultimately be incorporated into a permanent contract. I am bound to say that in my judgment the second paragraph of the letter dated July 1, 1949, cannot possibly be held to bear that suggested interpretation.

Thirdly, counsel submitted that even if the letter and the words "subject to the terms and conditions of service above referred to" can be said to incorporate some of the terms and conditions, they cannot be said to incorporate all of them. In a sense, of course, as counsel for the plaintiff conceded, this argument is obviously correct. The terms and conditions are a code and obviously into the contract with a part-time officer there cannot be incorporated the terms and remuneration applicable to whole-time officers. Similarly, certain other paragraphs in the terms and conditions are more applicable to the regional hospital board itself, and really contain directions to the regional hospital board rather than directions which may be incorporated in any contract between either a whole-time or a part-time officer and the regional hospital board.

However, in my judgment, cl. 16 is a clause which can quite clearly be incorporated in a contract made with either a whole-time or a part-time consultant, and if a whole-time or a part-time consultant is employed by the regional hospital board subject to these terms and conditions of service, one of the terms and conditions incorporated into his contract is cl. 16, which gives him a measure of security of tenure in his employment, and prevents its termination, if he considers the termination to be unfair, until the procedure laid down in that clause has been carried out. I cannot see any foundation for saying that the words "subject to the terms and conditions of service" can on any reasonable interpretation be said to exclude cl. 16. If any terms and conditions are to be incorporated in the contract, why should cl. 16 be excluded? I have been unable to find any satisfactory answer to that question. It is a clause clearly appropriate to inclusion in the contract of a consultant, just as appropriate as the clauses relating to his terms of remuneration, leave and other matters of a similar kind. Indeed, those words are identical with the words used in the proforma contracts suggested by the Ministry of Health and the regional hospital board which were offered to consultants when they entered into a long-term agreement. The long-term contract offered to the plaintiff did include words exactly similar to the words used in the letter of July 1, 1949. It is, I think, common ground that it was the intention of the Ministry and of the regional hospital board that the terms and conditions should in fact be incorporated in the long-term contracts, and they were in fact incorporated by the use (as I have said) of words exactly similar to the words used in the letter of July 1.

In my judgment those words clearly mean that those of the terms and conditions which are applicable to any particular contract are to be incorporated in it, and I am quite satisfied that under the letter dated July 1, which was never altered or amended in any way, except as regards remuneration, the plaintiff's employment with the regional hospital board was, throughout his service, from that date, regulated by those terms and conditions.

Counsel for the regional hospital board, however, went further than the suggestion that cl. 16 was not incorporated in this particular contract. He submitted that in every contract, be it what might be described as an interim contract of this kind or a permanent contract, cl. 16 could not form the basis of any

contractual and binding agreement between the regional hospital board and a consultant. He adduced, as one reason for that submission, that the operation of this clause involved the co-operation of the Minister and that the regional hospital board could never be sued on the ground that the Minister had refused that co-operation and denied the right of appeal to any particular consultant. Even if cl. 16 does form the basis of some contractual obligation, counsel for the regional hospital board submits that it must be subject to an implied term that its operation can only be effective if and when the Minister consents to entertain an appeal; if he does not do so prior to the termination of the consultant's employment, then the clause can have no operation. In view of the relationship between the Minister and the regional hospital board, which is made quite clear in s. 3, s. 11, s. 12, s. 13 and s. 14 of the National Health Service Act, 1946, I have no hesitation in rejecting that argument. I see no reason to suppose that, in the negotiations which took place between the Ministry and the representatives of the medical profession, it was ever doubted that cl. 16 would have contractual force. I am quite satisfied that it has contractual force.

I am unimpressed by the question raised by counsel for the regional hospital board as to what would happen if the Minister failed to entertain an appeal. I do not think that the regional hospital board would have to continue to employ a consultant until that consultant's death or until he reached the retiring age. It is, of course, a very unreal consideration, having regard to the relationship which I have mentioned between the Minister and the regional hospital board. The regional hospital board is administering the hospital and specialist services on behalf of the Minister, and subject to such regulations and directions as the Minister may give. If that were a real dilemma I see no reason why its solution should be thrust on the consultant rather than on the regional hospital board. If, indeed, in the inconceivable event of the Minister refusing to entertain an appeal, although a right of appeal had under his authority and directions been conferred on the consultant, and the regional hospital board was then placed in a difficulty, it would, I think, be for the regional hospital board to apply for an order of mandamus to compel the Minister to exercise his functions, and not for the consultant.

I am, therefore, satisfied, as I have said, that at least from July 5, 1949, cl. 16 of the terms and conditions of service formed part of the plaintiff's contract with the regional hospital board. The plaintiff was, of course, not bound to invoke the clause, and unless he did invoke it, or unless in law he was excused from doing so, before his employment was terminated he cannot, of course, rely on its provisions.

Both the defendants, as I understand it, raise, what to me is the singularly unmeritorious point, that the plaintiff failed to send a full statement of the facts to the Minister, and that, in consequence of that failure, the machinery of cl. 16 was never invoked by him, and never came into operation. In addition to its complete lack of merits, this point, I think, fails on two grounds. In the first place, as I have endeavoured to show when going through the correspondence, the plaintiff, by his previous solicitors, Messrs. Hempsons, and through a member of Parliament, did, in fact, supply a full statement of facts and supply that full statement to the Minister. But that point seems to me to be of less significance than the second point which I regard as quite fatal to the defendants' submissions on this point. If ever there was a case of waiver, in my judgment, this is one.

After the member of Parliament had taken the matter up and indeed before, when the Minister's representative was interviewed by Messrs. Hempsons on Jan. 14, the Ministry were saying that no appeal lay. The regional hospital board,

when it received information to that effect, as it did on Jan. 14, elected to support the Minister's view of the situation which was, I think, based on wholly inadequate information as to the facts of this particular case. Having done so, and done so, I think, with some alacrity, it adopted the same position as that which had been adopted by the Minister in relation to this appeal. In any event, I think the Minister can be regarded here as the principal of the first defendants in relation to this matter. If he denied the right of appeal and the regional hospital board acquiesced in that view after it, at a very early stage, became apprised of it, clearly, in my judgment, it does not now lie in its mouth to say: "We, having said that no appeal will lie, now contend that you cannot invoke the provisions of cl. 16 because you did not put into operation the appeal which we said we would refuse to entertain".

In those circumstances I am quite satisfied that the plaintiff's contract was governed by cl. 16, and that no omission to send a full statement of facts to the Minister, even if such omission was established, invalidated his contractual right which was that his employment should not be terminated until the machinery envisaged in cl. 16 had been put into effect and a decision reached by the Minister. Clearly, therefore, the termination of the plaintiff's services on Apr. 30, 1952, was a breach of the regional hospital board's contractual obligations to him. A breach of contractual obligation on the part of the regional hospital board having been established, it necessarily follows that the plaintiff is entitled to some remedy. As to what remedy that should be, I shall consider in a few moments.

Before I turn to the question of the remedies or remedy available to the plaintiff, I must say a few words concerning the other ground on which the plaintiff bases his claim, which is raised in the amended paragraphs of the statement of claim. The law, I think, is clear: in ordinary circumstances, by giving the appropriate notice, a master can terminate his servant's employment and no one can question the motives of the master in reaching a decision to do so. The position differs somewhat in relation to statutory bodies who can, of course, only act for the purposes for which they are created. A statutory body has, equally, an untrammelled right to terminate the services of one of its own employees by giving appropriate notice, provided that decision is arrived at bona fide. As I understand the meaning of the word, it is that the decision must be reached, and honestly reached, in the belief that it is a decision made in the best interests of the objects of the statutory body, namely, in this case, the administration of the health services in the region under the control of the regional hospital board, and not made for some wholly extraneous reason; an obvious extraneous reason would be shown if it could be proved that a decision to terminate the employment of a servant was made, not because it was genuinely or perhaps mistakenly thought by the statutory authority that the termination of his services was in the best interests of the service which they were administering, but because, while knowing that they were not furthering the interests of that service by dismissing him, the statutory authority dismissed the servant owing to personal spite against him. Then I think their decision could be impugned in the courts.

One thing is quite clear: the discretion of the authority must be the governing factor in cases of this kind, and the court cannot substitute its views whether or not a servant should, in certain circumstances, have been dismissed for the views of the authority, provided the views of the authority were bona fide held. I need not cite a great deal of authority on this point. The law is most fully

explained in the judgment of WARRINGTON, L.J., in *Short v. Poole Corpn.* (1). In view of the length of the present judgment, I think it is unnecessary for me to read those passages, which very clearly explain the position, and I need refer only to a very much shorter passage from the judgment of EVE, J., in *Price v. Rhondda Urban District Council* (2), which reads:

"A great deal of argument has been addressed to me on the question whether the authority in engaging and dismissing its employees, including teachers, is to be regarded as acting in a fiduciary capacity, but I do not think it necessary to deal fully with these arguments because in my opinion it is sufficient to point out that this body, being a statutory body entrusted with statutory powers, can only exercise those powers for the purpose of giving effect to the statutory duties imposed upon it, and as one must assume that in dismissing employees or in doing any other administrative act, or adopting any particular policy consistent with the powers conferred upon it, it acts in good faith, it lies upon those who assert the contrary to establish the truth of that assertion if they can."

Counsel for the plaintiff asks me to say that in the present case the regional hospital board, through its members and officials, was not acting bona fide or in the proper performance of its statutory powers when it reached its decision to terminate the plaintiff's employment.

[HIS LORDSHIP then reviewed the facts and found that the regional hospital board decided to terminate the plaintiff's appointment on the ground that this would be in the best interests of the health service, and that no member of the regional hospital board acted mala fide in reaching that decision. HIS LORDSHIP continued:] Now I come to the question of the plaintiff's remedies, which I regard as perhaps the most difficult problem in the present case. In the statement of claim the plaintiff asked for a declaration that his employment was subject to the terms and conditions of service issued by the Minister. I have already found that it was, and whether or not that declaration is made is a matter which is only of academic importance. The second claim is for a declaration that the plaintiff's employment with the regional hospital board has never been validly determined. The significant word is the word "validly". If the declaration asked for was one which merely declared that the plaintiff's employment had never been lawfully or rightly determined, that is a declaration which, if necessary at all, would follow from the findings which I have already made.

However, counsel for the plaintiff's case is that the termination of the plaintiff's employment on Apr. 30, 1952, was not only a breach of the plaintiff's contractual rights, but was in fact a nullity. In law, counsel for the plaintiff submits, the plaintiff's services were not terminated on Apr. 30, and have never been terminated up to today. In consequence he relies on the third prayer, namely, for an order for payment of salary at the full rate of £2,375 per annum from May 1, 1952, to the date of writ in this action. Counsel for the plaintiff puts the case in a way which, at first sight, appears attractive. The terms and conditions of service, as he points out, provide in the clearest possible terms that the procedure laid down in cl. 16 shall be completed before the regional hospital board's decision to terminate the consultant's appointment is carried into effect. That procedure was never completed and, therefore, says counsel for the plaintiff, the regional hospital board's decision to terminate the plaintiff's appointment can never have become effective and he is still in its service and is still entitled to his agreed rate of remuneration. Counsel for the plaintiff relied on certain

(1) (1926), 90 J.P. 25.

(2) (1923), 88 J.F. 69.

authorities, and, in particular, *Vine v. National Dock Labour Board* (1), and on the judgment of JENKINS, L.J., when the case came before the Court of Appeal, a judgment which was approved on appeal to the House of Lords.

In reply to this argument, counsel for the regional hospital board submits that here there is an ordinary relationship of master and servant. In his submission, the law relating to master and servant is clear: a contract for personal services cannot be enforced by an order for specific performance, nor is it open to a servant to refuse to accept the repudiation of the contract of service by his master and to sit back and say that the contract has never been validly terminated and insist on the payment of his wages for the remainder of his working days. Counsel for the regional hospital board rightly said that it could not be suggested that a servant, who by the terms of his contract was entitled to three months' notice on dismissal, could say, if he was instantly dismissed without notice, that the dismissal was ineffective because no lawful dismissal could take place without the giving of the requisite period of notice. Similarly, he says that the plaintiff cannot say that the *de facto* determination of his services, which undoubtedly took place on Apr. 30, 1952, or just after, as he was threatened with criminal proceedings if he entered Boundary Park Hospital, can be said to be a nullity because it was in breach of a contractual obligation not to put that decision to terminate into effect until cl. 16 had been allowed to operate. LORD KEITH OF AVONHOLM, in dealing with this question in *Vine v. National Dock Labour Board* (1), said:

"This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

Giving this matter the best consideration that I can, I am unable to equate this case to the circumstances which were being considered by the Court of Appeal and the House of Lords in *Vine v. National Dock Labour Board* (1). There the plaintiff was working under a code which had statutory powers, and, clearly, in those circumstances, all the lords of appeal who dealt with the case in the House of Lords took the view that the case could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract. Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more. In those circumstances I feel bound to apply the general rule stated by LORD KEITH OF AVONHOLM in the passage which I have just read, and to reach the conclusion here that the plaintiff's only remedy is the recovery of damages, subject, of course, to any question relating to some of the declarations which have been asked for.

To assess those damages is a matter of the gravest difficulty. It would, of course, be easy to say that, on the evidence, three months' notice appears to be the appropriate period, and no one has seriously argued to the contrary. However, the plaintiff's contract was, as I have held, subject to cl. 16, and to refer to it as a contract which in reality was subject to three months' notice is to take an entirely (as I think) false view of the position. It is subject to three months' notice only if, on appeal to the Minister, the Minister took the view that the consultant's services had not been unfairly terminated. In those

(1) [1956] 3 All E.R. 939; [1957] A.C. 488.

circumstances, the problem which I think faces me is first of all to assess the chances of a successful appeal, had an appeal been entertained in the present case, and then to do the best I can to ascertain the period during which the plaintiff would probably have been employed by the regional hospital board had that appeal been successful.

[His LORDSHIP was of opinion that, on the information before him, the professional committee who would have considered the plaintiff's case on an appeal to the Minister under cl. 16, would have advised the Minister that a substantial element of unfairness had entered into the termination of the plaintiff's employment, and that the appeal would have resulted in the plaintiff continuing to act as a consultant at Boundary Park Hospital at a salary of £2,375 per annum. His LORDSHIP was of the further opinion that five years was a fair period to take in assessing damages for the plaintiff's loss of remuneration for his hospital appointment. Regarding the plaintiff's claim for damages for losses incurred in his private practice, which had resulted from the fact that he and his private patients were excluded from all hospitals administered by the regional hospital board after the board had terminated the plaintiff's appointment, His LORDSHIP awarded the plaintiff £1,500.

His LORDSHIP stated that, in view of recent decisions, the plaintiff's liability for income tax must be taken into account in assessing the damages for loss of remuneration in respect of the hospital appointment, and he proposed to treat the plaintiff's liability to tax as 10s. in the pound in the absence of information on the matter.

His LORDSHIP said that he would not make the first and second declarations asked for, but that he would make the third declaration, which was asked for in claim (vi) of the statement of claim, viz., that the Minister of Health in failing to comply with the terms of cl. 16 of the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and the procedure therein laid down was acting wrongfully and in breach of his statutory duty under the National Health Service Act, 1946.]

Judgment for the plaintiff against the regional hospital board for £7,437 10s., and a declaration in the terms of claim (vi) of the statement of claim against the Minister of Health.

Solicitors: Gregory, Rowcliffe & Co., for Ponsonbys, Oldham; Solicitor, Ministry of Health.

G.A.K.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND PEARSON, JJ.)

December, 5, 6, 19, 1957

HILL v. BAXTER

Road Traffic—Dangerous driving—Defence—Automation—Failure to conform to traffic sign—Mens rea not an element of offence—Burden of proof—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 11 (1).

The offences of dangerous driving, contrary to s. 11 (1) of the Road Traffic Act, 1930, and of failing to conform to a traffic sign, contrary to s. 49 (b) of the same Act, are offences in which absolute prohibitions are enacted, and neither mens rea nor intention is an ingredient in either of them.

On informations for the above mentioned offences the driver of a motor car gave evidence that he remembered nothing after driving to a point some distance from the scene of an accident in which he was involved. The magistrates accepted his evidence, but found that he must have exercised care and skill in driving to reach the place where the accident occurred from the point at which his memory, according to his evidence, failed. They dismissed both informations, being of opinion that he was not conscious at the time of the accident "with the implication that he was not capable of forming any intention as to his manner of driving".

HELD, that, though there might be cases in which a person at the steering-wheel of a moving motor-car could be said not to be driving at all, e.g., where he had been overcome by a sudden illness or struck by a stone or attacked by a swarm of bees, in the present case the evidence showed that the defendant was driving the motor car and there was no evidence to justify the magistrates in finding that he was not fully responsible in law for his actions. The case, therefore, must be remitted to the magistrates with a direction to convict on both offences.

There is no decided authority on how far or in what circumstance automatism can be a defence to a criminal charge. On such a defence (per LORD GODDARD, C.J.) the burden of proof would be on the defence; (per DEVLIN and PEARSON, JJ.) the defence would have to produce at least prima facie evidence before such a defence could be considered, but the question where the burden of proof would ultimately rest should be left open for decision.

CASE STATED by Brighton justices.

At Brighton magistrates' court two informations were preferred by the appellant Hill, a police officer, charging the respondent, Kenneth Baxter, with dangerous driving of a motor van contrary to s. 11 (1) of the Road Traffic Act, 1930, and with failing to stop at a "Halt" sign.

The justices found that on April 12, 1957, the respondent was driving a motor van in Springfield Road, Brighton, failed to stop at a "Halt" sign, and drove straight across a road junction until his van came into collision with a motor car. The van then carried on for a short distance before overturning. The respondent was taken to hospital in a dazed condition and said: "I remember being in Preston Circus going to Withdean. I don't remember anything else until I was searching for my glasses. I don't know what happened." To be in Springfield Road on the way to Withdean involved a substantial and unnecessary detour, but the respondent must have exercised skill in driving in order to reach Springfield Road. The justices were of the opinion that the respondent was not conscious of what he was doing after leaving Preston Circus "with the implication that he was not capable of forming any intention as to his manner of driving", and, accepting a submission that loss of memory could only be attributed to the respondent being overcome by some illness without warning, they dismissed the information. The prosecutor appealed.

Anthony Harmsworth for the appellant.

Alliott for the respondent.

Cur. adv. vult.

Dec. 19. The following judgments were read.

LORD GODDARD, C.J.: This Special Case stated by justices for the County Borough of Brighton concerns two informations preferred against the respondent, the first for the dangerous driving of a motor vehicle contrary to s. 11 (1) of the Road Traffic Act, 1930, and the second for failing to conform to a Halt sign contrary to s. 49 (b) of the Act. The facts found by the justices are that at 10.45 p.m. on the evening of Apr. 12 this year the respondent drove a motor van along Springfield Road, Brighton, in a westerly direction and where that road crosses Beaconsfield Road he ignored an illuminated Halt sign, drove across the road junction at a fast speed and came into collision with a car which was being driven northwards in Beaconsfield Road. The respondent's van then carried on for a short distance and overturned. A police constable arrived and found the respondent in a dazed condition and at the hospital to which he was taken he said:

"I remember being in Preston Circus going to Withdean. I don't remember anything else until I was searching for my glasses. I don't know what happened."

The justices found that to be in Springfield Road on the way to Withdean from Preston Circus involved a substantial and unnecessary detour but that the respondent must have exercised skill in driving in order to reach Springfield Road by whatever route he took. The justices apparently accepted the respondent's evidence and found that he remembered nothing from the time when he was at Preston Circus till the accident had happened. They were of opinion that the respondent was not conscious of what he was doing after leaving Preston Circus and to this finding they add the words "with the implication that he was not capable of forming any intention as to his manner of driving". They dismissed the informations, accepting a submission that loss of memory could only be attributed to the respondent being overcome by illness without warning.

There was no evidence for the defence other than that of the respondent himself, but it seems that as the prosecution did not object the justices allowed two letters from a doctor who had examined the respondent to be put in. This was quite irregular; agreed medical reports so often used in civil actions have no place in criminal courts. Evidence must be given on oath and be subject to cross-examination unless there is a statutory exception allowing documents or certificates to be put in as evidence, as for instance under s. 41 of the Criminal Justice Act, 1948. The justices have referred to these letters in the Case so we have looked at them. They are certainly in no way favourable to the respondent; the consultant neurologist who examined the respondent could find no trace of illness or abnormality. He said in his first report he had had an E.E.G.—that is some form of encephalogram—done and was going to examine the respondent again when the report would be through in a fortnight's time. In his further report on May 2 the doctor says the report showed no abnormality and that from a medical point of view it is impossible to say whether he had "a black-out" or not. So there is no medical or scientific evidence of any illness at all.

The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring Halt signs. No question of mens rea enters into the offence; it is no answer to a charge under those sections to say "I did not mean to drive dangerously" or "I did not notice the Halt sign". The justices' finding, that the respondent was not capable of forming any intention as to the manner of driving, is really immaterial. What

they evidently meant was that the respondent was in a state of automation. But he was driving and, as the Case finds, exercising some skill, and undoubtedly the onus of proving that he was in a state of automation must be on him. This is not only akin to a defence of insanity but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This no doubt is subject to the qualification that where an onus is on the defendant in a criminal case the burden is not as high as it is on a prosecutor. The main contention before us on the part of the appellant was that there was no evidence on which the justices could find that the respondent was in a state of automatism or whatever term may be applied to someone performing acts in a state of unconsciousness. There was in fact no evidence except that of the respondent, and, while the justices were entitled to believe him, his evidence shows nothing except that after the accident he cannot remember what took place after he left Preston Circus. This is quite consistent with being overcome with sleep or at least drowsiness. That drivers do fall asleep is a not uncommon cause of serious road accidents and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop. The justices no doubt were greatly influenced by the dictum—and it is only a dictum—of HUMPHREYS, J., in *Kay v. Butterworth* (1). In that case the learned judge after emphasising that drowsiness or sleep would be no excuse said:

“I do not mean to say that a person should be made liable at criminal law who, through no fault of his own, becomes unconscious while driving, as, for example, a person who has been struck by a stone or overcome by a sudden illness, or when the car has been put temporarily out of his control owing to his being attacked by a swarm of bees . . .”

I agree that there may be cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called Acts of God; he might well be in the driver's seat even with his hands on the wheel but in such a state of unconsciousness that he could not be said to be driving. A blow from a stone or a swarm of bees I think introduces some conception akin to “*novus actus interveniens*”. In this case, however, I am content to say that the evidence falls far short of what would justify a court holding that this man was in some automatous state. There was no evidence that he was suffering from anything to account for what is so often called a “black-out” and which probably, if genuine, is epileptic in origin. Nor was there any evidence that he had ever had an attack of this description before. As I have said, his own evidence, and that is all there was, is consistent with having fallen asleep, or having his mind full of other matters and not paying proper attention. A defence of automatism is in effect saying that the accused did not know or appreciate the nature and quality of his actions, so it is getting very near a defence of insanity. It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up. In the present case I am content to rest my judgment on the ground that there was no evidence which justified the justices finding that he was not fully responsible in law for his actions and that his intention was immaterial as there was here an absolute prohibition. I would allow the appeal. I desire to say in view of some discussion at the hearing that this is certainly not a case of perverse finding

Eng. Pet

by justices, who obviously considered the case with great care and anxiety. The question asked by the justices is answered in the negative and the case must go back with a direction to convict. The penalty is a matter for the justices, but we have no doubt they will bear in mind the view of the neurologist as to the fitness of the defendant to drive.

DEVLIN, J.: I agree that if the onus lies on the defence to produce some evidence of automatism, they have failed to do so, with the result that the justices came to a wrong conclusion in law. I do not find it necessary, before deciding whether there is such an onus, to determine just what part automatism plays in liability for crime. It is a novel point that would require careful consideration; the answer would certainly depend among other things on the nature of the liability which the prosecution had to establish.

I am satisfied that even in a case in which liability depended on full proof of *mens rea*, it would not be open to the defence to rely on automatism without providing some evidence of it. If it amounted to insanity in the legal sense, it is well established that the burden of proof would start with and remain throughout on the defence. But there is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt. This principle has manifested itself in different forms; most of them relate to the accused's state of mind and put it on him to give some evidence about it. Thus the fact that an accused is found in possession of property recently stolen does not of itself prove that he knew of the stealing. Nevertheless it is not open to the accused at the end of the prosecution's case to submit that he has no case to answer; he must offer some explanation to account for his possession though he does not have to prove that the explanation is true: *R. v. Aves* (1). In a charge of murder it is for the prosecution to prove that the killing was intentional and unprovoked and that burden is never shifted: *Woolmington v. Public Prosecutions Director* (2); but, though the prosecution must in the end prove lack of provocation, the obligation arises only if there is some evidence of provocation fit to go to the jury; *Holmes v. Public Prosecutions Director* (3). The same rule applies in the case of self-defence: *R. v. Lobell* (4). In any crime involving *mens rea* the prosecution must prove guilty intent, but if the defence suggests drunkenness as negating intent, they must offer evidence of it, if indeed they do not have to prove it: *Public Prosecutions Director v. Beard* (5). It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleepwalking or not in a trance or black-out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least *prima facie* evidence. I should wish to reserve for future consideration when necessary the question of where the burden ultimately lies.

As automatism is akin to insanity in law there would be great practical advantage if the burden of proof were the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted.

(1) 114 J.P. 402; [1950] 2 All E.R. 330.

(2) [1935] All E.R. Rep. 1; [1935] A.C. 462.

(3) [1946] 2 All E.R. 124; [1946] A.C. 588.

(4) [1957] 1 All E.R. 734.

(5) [1920] A.C. 479; sub. nom. *R. v. Beard* 84 J.P. 129.

In my judgment there is not to be found in the Case Stated evidence of automatism of a character which would be fit to leave to a jury. It must be remembered that the justices were required to presume that the accused was not suffering from any disease of the mind, since he did not challenge the legal presumption of sanity. Although he was asserting that he did not know the nature and quality of his act and so inevitably that he was suffering from a defect of reason or understanding, he was not saying that he was a victim of any disease of the mind. Unless there was evidence which showed that his irrationality was due to some cause other than disease of the mind, the justices were not entitled simply to acquit.

I agree that the conclusion which this court has reached does not mean that the justices have acted in any way perversely. We have been told that the chairman of the justices was a medical man and it may be that he felt able to draw inferences from the evidence which are not apparent to a layman. But judges of all kinds sit as laymen and not as experts and verdicts of all kinds must be given according to the evidence. I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.

I have drawn attention to the fact that the accused did not set up a defence of insanity. For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. If, however, disease is present the same thing may happen again and therefore since 1800 the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict "Guilty but insane", and while it seems right that in such a case some conditions should be imposed, the only restraint known to the law is indefinite detention in what used to be called a criminal lunatic asylum. So it would be very surprising to find this defence raised in answer to charges under the Road Traffic Act, 1930. Whatever the theory of the law may be, mental disease is in practice not available as an excuse for the commission of any of the lesser crimes. I agree with the order proposed.

PEARSON, J.: I agree with the judgment of LORD GODDARD, C.J., subject to the reservation and explanations which DEVLIN, J., has made with regard to the burden of proof in a case such as this. The prosecution have to prove that the accused was driving dangerously on the major charge in this case. On the facts of this case if he was driving at all he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the van. In any ordinary case when once it has been proved that the accused was in the driving seat of a moving car, there is *prima facie* an obvious and irresistible inference that he was driving it. No dispute or doubt will arise on that point unless and until there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. Take the following cases. (1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he

is for the time being disabled and prevented from exercising any directional control over the vehicle and any movements of his arms and legs are solely caused by the action of the bees. In each of these cases it can be said that at the material time he is not driving and therefore not driving dangerously. Then suppose that the man in the driving seat falls asleep. After he has fallen asleep he is no longer driving, but there was an earlier time at which he was falling asleep and therefore failing to perform the driver's elementary and essential duty of keeping himself awake and therefore he was driving dangerously. Similarly in the case of a man who knows that he is liable to have an epileptic fit but nevertheless drives a vehicle on the road, there is a question of fact whether driving in these circumstances can properly be considered reckless or dangerous. The answer might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come on him.

For the purpose of construing the word "drive" in the Road Traffic Act, 1930, s. 11, one can have regard to the language of s. 15 (1) of the same Act. The opening words of that section before it was amended by the Road Traffic Act, 1956, were:

"Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable . . .",

and so on. In this case there is a clear finding that the appellant was driving and driving with skill. It is said in the Case:

"(H) The respondent intended to go to Withdean from Preston Circus, and he had made a substantial and unnecessary detour by driving into Springfield Road. (I) The respondent must have exercised skill in driving in order to reach Springfield Road from Preston Circus by whatever route he had taken."

The importance of the finding that he was driving with skill is the necessary implication that he was controlling the car and directing its movements. Therefore, he was driving, and his driving was dangerous. Therefore the offence was committed and there is no evidence to support the acquittal. The facts proved show that the respondent was driving and driving dangerously, and if the burden of proof was on the defence they failed to prove an extraordinary mischance rendering it impossible for the respondent to control the van and direct its movements. I agree with the proposed order.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Brighton; *Jolly & Co.*, Brighton.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND PEARSON, J.J.)

December 11, 19, 1957

KRUHLAK v. KRUHLAK

Bastardy—"Single woman"—Marriage of complainant with putative father—Child born before marriage—Subsequent separation of complainant and putative father—Separation order containing non-cohabitation clause—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 3.

In 1953 a married woman, who had been living apart from her husband since 1940, gave birth to a bastard child of which the respondent was the putative father. Soon afterwards, a decree nisi which the husband had obtained against her was made absolute, and later she married the respondent. In March, 1957, she obtained against the respondent a separation order which contained a non-cohabitation clause. While living apart from the respondent under the order, she applied, as a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, for a summons to be served on the respondent in respect of the bastard child.

HELD: that she was a "single woman" quoad her husband, as she was at the time living apart from him under the separation order and was entitled to make the application.

Mooney v. Mooney (1952) (116 J.P. 608) distinguished.

CASE STATED by justices of the county of the West Riding of York acting in and for the petty sessional division of Osgoldcross.

On Apr. 5, 1957, a complaint was preferred by the appellant, Hilda Mary Kruhlak, against the respondent, Hilko Kruhlak, alleging that the respondent was the father of her bastard child born on Dec. 2, 1953. The complaint, which was made under s. 3 of the Bastardy Laws Amendment Act, 1872, was heard at Castleford Magistrates' Court on May 22, 1957, when the following facts were found.

The appellant gave birth to a girl on Dec. 2, 1953, at 7.30 a.m., of which child she alleged the respondent to be the father. On the same day, Dec. 2, 1953, at 10 a.m. a decree nisi was made absolute in favour of the appellant's former husband from whom she had been living separate and apart since 1940. The appellant and the respondent, who had been on intimate terms since September, 1952, were married on Dec. 19, 1953. On Mar. 26, 1957, a separation order, containing a non-cohabitation clause, was made in favour of the appellant against the respondent on the grounds of persistent cruelty. It was contended by the appellant that she was a single woman quoad the respondent in relation to the child who was the subject of the complaint; and by the respondent that she could not so establish herself quoad the respondent, he being her husband.

The justices were of opinion that there was a distinction between the present case and the facts in *Mooney v. Mooney* (1) in that the appellant had obtained an order against the respondent on the ground of persistent cruelty; but that in view of the judgment in that case it was not open to them to hold that a married woman who summoned her husband could be heard to say she was a single woman; and, accordingly, they dismissed the complaint. The complainant appealed.

Ranking for the appellant, Hilda Mary Kruhlak.

Deby for the respondent, Hilko Kruhlak.

Cur. adv. vult.

Dec. 19. The following judgments were read.

(1) 116 J.P. 608; [1952] 2 All E.R. 812; [1953] 1 Q.B. 38.

DEVLIN, J.: The question in this case is whether the appellant can be said to be a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, notwithstanding the fact that she is married to the respondent, by whom she had previously had an illegitimate child.

It has been settled by a series of cases that in construing the expression "single woman" the courts will have regard to the de facto position of the woman rather than to her status in the eyes of the law. Thus, a woman who has been legally separated from her husband or one who lives apart from him and has by her conduct forfeited the right to maintenance has been held to be a single woman. The importance of this last factor is that until 1948 a man who married a woman with an illegitimate child was bound to support the illegitimate child as well as any children of his own by the marriage. So if a wife could have obtained maintenance for the child both from the husband and from the putative father there would have been a double liability; and this indeed was the reason why the relief under the Act of 1872 was given only to a single woman. The National Assistance Act, 1948, s. 42, now provides that a husband is bound to support only his own children.

Until *Mooney v. Mooney* (1) all the cases which the courts had considered were cases in which the woman, having had an illegitimate child by one man, had later gone off and married someone else. *Mooney v. Mooney* (1) was a case, as is the present one, in which the woman married the putative father; and it was also a case, as in this one, in which the subsequent marriage did not legitimate the child. Such a case would have raised no problem before the Act of 1948, since before then the man would have been obliged either as husband or putative father to support the child anyway. But after the Act of 1948 the only way in which the woman could get maintenance for the child was by means of a bastardy order. The artificiality of the construction that the courts have given to the expression "single woman" is brought into high relief when a wife asserts against her own husband that she is a single woman. Nevertheless, once the point is reached when the fact of singleness is determined by looking at the actual state to which the woman has been reduced and not at her status in the eyes of the law, it seems to me that a woman whose husband has deserted her or cast her off can say to him, with as much force as she can say it to anyone else, that he reduced her to living as a single woman. If she cannot say that, it would mean that he escapes the obligations of putative fatherhood first by marrying her and then by committing a matrimonial offence.

In *Mooney v. Mooney* (1) the husband and putative father supported the illegitimate child from the time of the marriage until his wife left him. She left him in circumstances which precluded her from obtaining a maintenance order on the ground of desertion; he was willing to have her back and support her and her child but she refused to return to him. This raised the question whether a woman can choose to reduce herself to the condition of a single woman within the meaning of the Bastardy Laws Amendment Act, 1872, by deserting her husband. In some cases the courts have permitted that to be done. The court in *Mooney v. Mooney* (1) were dealing with a case in which the husband was willing to give his wife all the benefits of marriage and to treat his illegitimate child just as though it had been born in wedlock. In such circumstances the court held that a wife could not be heard to say as against her husband that she was to be treated as if she were a single woman.

Now the facts in the present case are entirely different. It is not the appellant who has broken off the marriage; on Mar. 26, 1957, she obtained a separation

order, including a non-cohabitation clause, against the respondent on the ground of persistent cruelty.

Counsel for the respondent, who has argued this case extremely well, has contended that *Mooney v. Mooney* (1) must be taken to lay down as an invariable rule that, whatever the circumstances, a wife can never claim as against her husband that she is a single woman. There are expressions in the judgment which, taken by themselves, might bear that interpretation, particularly the one to which I have already referred, namely, that when a married woman summons her husband she cannot be heard to say that she is a single woman—but the phrase “cannot be heard” is not being used as if to indicate that the question is one of estoppel. No such principle can apply to the construction of a statute. If the facts of a case make a woman a single woman within the meaning of the statute, then she is so for all the purposes of the statute; and different constructions cannot be given to the statute according to the different status of the persons who may be parties to proceedings that are brought under it. The expression “cannot be heard” means, I think, that in all the circumstances of that case it was an impossible contention for the appellant to make. In the circumstances of this case I can see nothing to prevent the appellant from relying on the separation order in the same way as has been done in the past to justify her claim that she is a single woman.

The justices considered this case to raise a difficult problem, as indeed it does. They thought that it was not for them to find ways of distinguishing *Mooney v. Mooney* (1) and that such a matter had better be left for the High Court; they invited the parties to apply for this Case to be stated. In my judgment, the appeal should be allowed, the question stated should be answered in the affirmative and in favour of the appellant and the justices should now proceed to the hearing of the appellant's complaint.

I desire to add this, that in the course of the argument counsel for the respondent raised the point whether the child had been legitimated. The position was that on Dec. 19, 1953, the appellant was married to the respondent. Seventeen days before that, on Dec. 2, 1953, the appellant had given birth to an illegitimate child, a girl, whose father she alleged the respondent to be. If that allegation is right the subsequent marriage would under the Legitimacy Act, 1926, but subject to s. 1 (2) of the Act, have legitimated the girl. Section 1 (2) provides, however, that nothing in the Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born. In fact the appellant had been married to another man, from whom she had been separated since 1940 and from whom she was divorced before she married the respondent. The decree absolute dissolving this earlier marriage was pronounced at 10 a.m. on Dec. 2, 1953, the girl having been born 2½ hours earlier at 7.30 a.m. on the same day. Since the birth of the child and the dissolution of the marriage occurred on the same day, there may be room for argument about the effect of s. 1 (2). If it does not apply and assuming of course the paternity of the respondent, he would be liable on any view to maintain the girl; but this possibility did not occur to anyone until it was perceived by counsel for the respondent. All that the justices were asked to deal with was a summons by the appellant under the Bastardy Laws Amendment Act, 1872, and the illegitimacy of the child was not put in issue. The only question stated in the Case is whether the appellant can be held to be a “single woman” within the meaning of that Act. That is the only point with which I have dealt in this judgment, and the other point as to legitimacy remains open for what it is worth.

(1) 116 J.P. 608; [1952] 2 All E.R. 812; [1953] 1 Q.B. 38.

LORD GODDARD, C.J.: I agree in the result with the judgment that has just been delivered, but, as I was a party to the decision in *Mooney v. Mooney* (1), I desire to give my reasons, which I can do quite shortly. It is firmly established that for the purposes of the bastardy laws a married woman living apart from her husband may be regarded, if the circumstances permit, as a single woman and so entitled to take proceedings in bastardy. I say "if the circumstances permit" because unless non-access can be proved or inferred the child would be regarded as legitimate if born in wedlock. If a woman is in fact living apart from her husband and by her adultery has lost her title to maintenance in his home she returns, as was said by LITLEDALE, J., in *R. v. Flintan* (2), to the same status as if she were not married. If she is separated either by deed or by the order of the court the presumption of access and the legitimacy of the child is rebutted, provided the parties are actually living apart under the deed or in consequence of the order. As the parties in this case are living apart under an order of the court which contains a non-cohabitation clause, there can be no doubt that, had this woman borne a child conceived since the date of the order, she could have taken proceedings as a single woman against the putative father. The difficulty that arises here is because the mother of the child married the alleged father after the birth of the child. A married woman who was living with her husband at the time when the application was made has never been treated as a single woman; but, as in this case she was living apart from him under this order, I do not see why she should not take proceedings against him, as the child was born before marriage, just as she could against any other man. *Mooney v. Mooney* (1) was different. That again was a case where a woman sought an order against her husband and it was not disputed apparently that the husband was the father of the child, as he had cohabited with the mother before marriage. She had, however, left her husband against his will and, although he was ready to receive her back, she would not return. There seemed accordingly no ground on which she could be regarded as a single woman. I agree that this appeal should be allowed. The case raised a difficult point for the justices and I think it was quite reasonable for them to say as they did that, if it was to be distinguished from *Mooney v. Mooney* (1), the distinction should be drawn by this court.

PEARSON, J.: I agree. It is clear from the many cases decided under the Bastardy Laws Amendment Act, 1872, that the expression "single woman" cannot be interpreted literally but has an extended meaning including some married women. In my view, the principle to be deduced from the previously decided cases is simply that a married woman who is for the time being effectively separated from her husband may be regarded as a single woman for the purposes of the Act of 1872, and the material time is the time of the application. Here we have a married woman who was living apart from her husband under a separation order. There could be no more effective separation than that. I have referred to the cases, and I have not found anything which would conflict with the apparently obvious proposition that a woman in that state can be treated as a single woman, having regard of course to the other decisions under which it becomes plain that the simple literal meaning cannot be given to that expression. I therefore agree with the order proposed. *Case remitted.*

Solicitors: *Long & Gardiner*, for *A. Maurice Smith*, Castleford; *Collyer-Bristow & Co.*, for *Alf. Masser & Co.*, Castleford.

T.R.F.B.

(1) 116 J.P. 608; [1952] 2 All E.R. 812; [1953] 1 Q.B. 38.

(2) (1830), 1 B. & Ad. 227.

COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND ORMEROD, L.JJ.)

December 10, 11, 19, 1957

MACFARLANE v. GWALTER

Highway—Non-repair—Grating admitting light to cellar—Dedication as part of highway—Liability of owner or occupier of premises for resulting accident—Public Health Acts Amendment Act, 1890 (53 and 54 Vict. c. 59), s. 35 (1).

The plaintiff was walking along the pavement of a public highway when her left leg went through an iron grating. The grating, which admitted light to the cellar of an adjacent building, was in bad condition and constituted a nuisance. The defendant, the occupier of the adjacent building, knew of its condition and failed to remedy it. The grating formed part of the dedicated highway. The plaintiff claimed damages for nuisance caused by the defendant's breach of his statutory duty under s. 35 (1) of the Public Health Acts Amendment Act, 1890, to repair the grating. The defendant contended that he was not under a duty to repair the grating because it was vested in the local authority by reason of s. 149 of the Public Health Act, 1875, and it was their duty to repair the highway or any part thereof. Alternatively, he said that a breach of s. 35 (1) of the Act of 1890 did not give rise to a cause of action under the sub-section or at common law.

HELD: (i) s. 35 (1) of the Act of 1890 imposed the duty to repair the structures on the surface of or under a street referred to therein on the owner or occupier of the adjoining building, whether they had been the subject of dedication or not, and, therefore, the defendant, as occupier of the adjoining building, and not the highway authority, was under a duty to keep the grating in repair; (ii) the defendant had failed in his duty to keep the grating in repair and allowed the same to become a nuisance, and therefore, he was responsible at common law for the injuries suffered by the plaintiff.

APPEAL by plaintiff from an order made by His Honour JUDGE GLAZEBROOK at Gravesend County Court.

The plaintiff was an infant and by her next friend claimed damages limited to £100 for personal injuries which she alleged had been caused by the defendant's breach of statutory duty. She also pleaded nuisance. In the particulars of claim the plaintiff alleged that the defendant was possessed of a grating immediately adjoining a public highway and that the plaintiff while lawfully passing along the highway slipped through the grating and was injured. The plaintiff gave the following particulars of the causes of action:

"Particulars of nuisance. The defendant wrongfully suffered the grating to remain in such a state as to be dangerous to persons lawfully passing along the highway.

"Particulars of breach of statutory duty. The defendant in breach of s. 35 of the Public Health Acts Amendment Act, 1890, as occupier of [the premises adjoining the grating], failed to keep a grating in the surface of a street in good condition and repair."

The defendant by his defence admitted that he was the occupier of the premises, but denied the bad state of repair of the grating and alleged that the grating formed part of the highway which was dedicated to the public subject to the said grating. The defendant was tenant of the premises, and was, it appeared, under obligation as between himself and the landlord for repair of the premises. The county court judge dismissed the action on the grounds (i) that s. 35 (1) of the Act of 1890 gave no cause of action, (ii) that as the grating was fixed in the surface so as to become part of the highway the local authority was responsible for its repair.

Hugh Griffiths for the plaintiff.

Kidwell for the defendant.

Cur. adv. vult.

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Dec. 19. **ORMEROD, L.J.**, read the following judgment: This is an appeal from an order of His Honour JUDGE GLAZEBROOK made on July 10, 1957, at Gravesend County Court dismissing an action by the plaintiff against the defendant for damages for personal injuries arising from the breach of duty of the defendant. The plaintiff is an infant aged twelve. On Oct. 27, 1956, she was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating which was old and in bad condition. It appeared that one of the bars had broken and fallen into the area below the grating. The learned judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the occupier of the adjacent building, by his servant Mrs. Jones knew of its condition before the accident and could have taken steps to repair it. The grating was fixed into the pavement and was two feet six inches by eighteen inches. It covered a small open area and its purpose was to provide light for the cellar window of the defendant's premises. There was no conclusive evidence available whether the grating was there when the street was dedicated, but the surveyor who was called said that the local authority would not now accept dedication of a street containing such a grating. The judge said:

"It seems clear that if the grid, or some predecessor, was put there by the owner of the adjacent property, it must have been done before dedication because he would have had no power to do it afterwards";

and this appeal has been argued on the basis that the grid was there at the time of dedication. The learned county court judge held that the defendant was under no liability to the plaintiff either under the statute or at common law.

The questions for this court are whether the defendant was under any duty to repair the grating, and, if so, whether by reason of his failure to perform this duty a nuisance had been created on the highway causing injury to the plaintiff for which the defendant could be made liable in damages.

Counsel for the plaintiff argued that the defendant was under a duty to repair the grating by virtue of s. 35 (1) of the Public Health Acts Amendment Act, 1890. He submitted that the defendant, in breach of the duty, had allowed the grating to fall into so dangerous a condition as to cause it to become a nuisance on the highway, and that, the plaintiff having suffered injuries by reason of the nuisance, the defendant was liable to compensate her in damages.

Section 35 (1) reads as follows:

"All vaults, arches, and cellars under any street, and all openings into such vaults, arches, or cellars in the surface of any street, and all cellar-heads, gratings, lights, and coal holes in the surface of any street, and all landings, flags, or stones of the path or street supporting the same respectively, shall be kept in good condition and repair by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong."

It should be noted that s. 35 (2) provides that where default is made in complying with the provisions of the section, the urban authority may, after notice, do the necessary work and recover the cost from the owner or occupier. It was argued that the grating in question came within the meaning of sub-s. (1) and that the defendant was the occupier of the house or building to which the grating belonged, there being no reason for the existence of the grating other than to cover the small area which admitted light to the cellar of the defendant's premises.

We were referred to a number of authorities in support of this submission. I propose to mention three of them. *Penney v. Berry* (1) was a case where the defendant was the owner of premises adjoining the highway and in the surface

of the pavement was an opening into a cellar covered by a metal slab set in a large flagstone. In about 1950 the local authority raised the level of the pavement and so reconstructed it that the metal cover had a concrete surround and rested in a rebate in the concrete. Unfortunately, it was so constructed that one side of the cover was three-quarters of an inch higher than the pavement, with the result that in January, 1953, the plaintiff tripped on the cover and was injured. It was held that she was not entitled to recover from the defendant. PARKER, L.J., said:

"... the general principle, as I understand it, is that there can be no duty on the owner of land adjoining the highway where the nuisance is to abate the nuisance, because the liability is, primarily at any rate, on the local authority, and, unless he has some statutory power to do so, the owner has no right to go on to the pavement to abate the nuisance. As SHEARMAN, J., put it in *Horridge v. Makinson* (1): 'In my opinion the cases show that a liability is cast upon the owner of a house, in respect of a nuisance, only when such owner has a duty to abate the nuisance, and he fails to do so'. I think I might add that it is only when such owner has a duty and a power to abate the nuisance."

PARKER, L.J., then referred to s. 35 (1) and said:

"It is quite clear, therefore, that there was an obligation on the defendant to keep this cover... in good condition and repair. To my mind, the only question in this case is what those words 'in good condition and repair' are apt to cover."

PARKER, L.J., then discussed why in his view there was no breach of duty on the part of the defendant. This case was relied on by the plaintiff as establishing that there was a duty on the defendant to keep the slab in repair and, at least by inference, that if as a result of the defendant's breach the slab fell into disrepair, the defendant would be responsible for any injury thereby caused.

Russell v. Men of Devon (2) was a case where the inhabitants of a county were sought to be made liable for injury caused to an individual in consequence of a county bridge being out of repair. LORD KENYON, C.J., held that such an action could not be maintained, but said:

"Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair."

The principle that an individual cannot recover damages in respect of an injury arising from the default of the public in its duty to repair a highway remains today in the doctrine that a local authority cannot be made liable for injury to an individual arising from non-feasance in the repair of the highway. This would appear to be because the various statutes passed in the nineteenth century putting the liability to repair on surveyors and local authorities were regarded merely as a means of getting the repairs done and not as intending to create any new right of action; see per LORD HALSBURY, L.C., in *Cowley v. Newmarket Local Board* (3).

In *Pretty v. Bickmore* (4) an aperture covered by an iron plate was out of repair so that a passer-by was injured. The question at issue was whether the

(1) (1915), 79 J.P. 484.

(2) (1788), 2 Term Rep. 667.

(3) 56 J.P. 805; [1892] A.C. 345.

(4) (1873), 37 J.P. 552; L.R. 8 C.P. 401.

landlord or the tenant was liable to the plaintiff in view of the terms of the demise, but in the course of his judgment BOVILL, C.J., said:

"The person who is in possession of the premises and who allows the coal-plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair."

On behalf of the defendant, counsel agreed that if the grating in question did not form part of the dedicated highway the defendant would be liable. His submission was that as the grating was in position at the time the highway was dedicated and was fixed to the highway it was part of the highway and became vested in the local authority by reason of the Public Health Act, 1875, s. 149, which provides that all streets being or which at any time become highways repairable by the inhabitants at large shall vest in and be under the control of the urban authority. He argued in the first place that the gratings and other matters referred to in s. 35 (1) of the Act of 1890 comprised only cases where the gratings, etc., were not a dedicated part of the highway and, therefore, not vested in the local authority. For my part, I cannot accept this submission. The sub-section refers in the first place to "All vaults, arches, and cellars under any street"—matters which would be unlikely to be the subject of dedication—"and all openings into such vaults", etc., and then goes on to refer to "all cellar-heads, gratings", etc. There is no restriction to cellar-heads, etc., which do not form part of a dedicated highway. Counsel for the defendant sought to draw support for his argument from the words

"shall be kept in good condition . . . by the owners or occupiers of the same, or of the houses or buildings to which the same respectively belong."

He submitted that the word "belong" was ambiguous in its meaning, but that it must carry an element of proprietary interest. I think that the meaning of the words is plain. The sub-section refers to certain structures which are either under the street or in the surface of the street, and in my view its intention is to throw on to the owners or occupiers of these structures, or on the owners or occupiers of the adjoining buildings, the duty of keeping them in repair whether they have been the subject of dedication or not. A grating such as the one in question belongs to the adjoining house or building in the sense that it came into existence and has continued to exist for the sole purpose of providing access of light to the cellar of that house or building, and, therefore, the duty to repair it falls on the defendant. It was argued that as the grating was part of the highway it was vested in the local authority and, therefore, the effect of s. 35 was to throw on to the authority the duty of repairing it and that this pointed strongly to the construction that the sub-section was referring only to structures which had not been the subject of dedication. For my part, however, on reading the section as a whole I have no doubt that the view which I have already expressed is the right one.

It was further submitted on behalf of the defendant that assuming the section applies to a dedicated object, the plaintiff is still not entitled to succeed. Counsel for the defendant argued that the plaintiff must sue on the statute, and that as the section in question was not one the breach of which would give rise to a remedy the plaintiff was bound to introduce what he called a "middle term", the concept of control, between the statute and liability. He argued that this was not a logical thing to do. The question whether a breach of the duty imposed by the section would give rise to a remedy was not argued before us, although counsel for the plaintiff wished to keep the point open. I fail to see what is illogical in introducing what counsel for the defendant called a middle

term. The position is that there was a structure on the highway and it was the duty of the defendant to keep it in repair. Whether that duty arose by statute or from any other circumstance does not appear to be relevant. The defendant having failed in his duty, the structure fell out of repair and became dangerous to passers-by and thereby became a nuisance on the highway. As a result of that nuisance the plaintiff was injured. I see no reason why in these circumstances she cannot recover damages from the defendant. It is true that if the duty to repair was on the local authority she would not have been able to recover unless she could show that the nuisance was due to misfeasance; but it is not suggested here that the defendant is in any sense the successor of the inhabitants at large so as to be able to claim the protection of the rule as to non-feasance. LORD KENYON, C.J., in *Russell v. Men of Devon* (1) regarded as incontrovertible the principle that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair, and in my judgment there are no circumstances in this case to give rise to a different conclusion. For these reasons, I would allow the appeal and enter judgment for the plaintiff in the sum of damages assessed by the learned county court judge.

ROMER, L.J.: I have had the advantage of reading in advance the judgment which ORMEROD, L.J., has given, and I so fully concur in that judgment, both in the reasoning and its conclusions, that there is nothing I desire to add.

LORD EVERSHED, M.R.: I likewise have had the advantage of seeing the judgment of ORMEROD, L.J., in advance, and, like ROMER, L.J., I feel that any addition I might make to the reasoning of it would be mere surplusage on my part. In confining myself, therefore, to that expression of agreement, I shall not, I hope, be thought to be disrespectful to the judgment of the learned judge with whom we are disagreeing or to the cogent and attractive argument of counsel for the defendant.

Appeal allowed.

Solicitors: Church, Bruce & Hawkes, Gravesend; Tolhursts, Gravesend.

F.G.

(1) (1788), 2 Term Rep. 667.

COURT OF APPEAL

(LORD EVERSHED, M.R., PARKER AND SELLERS, L.J.J.)

January 22, 23, 1958

CRADDOCK v. HAMPSHIRE COUNTY COUNCIL

Landlord and Tenant—New tenancy—Business premises—Land let with buildings—Landlord local authority—Intention of local authority to demolish buildings and let land as smallholding.

By a tenancy agreement, dated April 30, 1953, a county council let to the tenant land comprising 229 acres for one year certain and thereafter from year to year at a rent of £52 per annum. On the land there were some buildings in the nature of a Nissen hut and sheds which the tenant covenanted to keep in good repair and to remove if required to do so. The tenant conducted on the land the business of a repairer of motor cars and agricultural implements. After having received notice to quit the tenant applied for a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, and the county council opposed the grant on the ground, under s. 30 (1) (f) of the Act, that on the termination of the tenancy they intended to demolish the premises comprised in the holding. It was proved that the council proposed to let the land, when they had recovered it, to an agricultural tenant.

HELD: the tenant was not entitled to a new tenancy because the intention of the council to recover the land was established, and that intention was not vitiated by the fact that the main purpose was to incorporate the land into another tenant's agricultural holding.

APPEAL by the Hampshire County Council and Eva Sardinia Borthwick-Norton, from a decision of His Honour JUDGE TYLER, at Portsmouth County Court, declaring that the applicant, Reginald William Craddock, was entitled to a new tenancy of premises known as "Highbank Engineers", London Road, Purbrook, Hampshire. By his application, dated May 27, 1957, the applicant applied for the grant of a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, for a term of fourteen years. The Hampshire County Council held the land under a lease for a term of which less than fourteen years was unexpired, from the freeholder, Mrs. Borthwick-Norton, who was joined in the proceedings. The county council opposed the grant of the new tenancy on the grounds stated in their notice under s. 25 of the Act of 1954, viz., (a) that they intended to demolish and reconstruct the premises comprised in the holding or a substantial part thereof; (b) that they intended to occupy the holding for the purposes of a business to be carried on by them.

Stinson for the appellants.

Balcombe for the tenant.

LORD EVERSHED, M.R.: In this case the respondent to the appeal, a Mr. Craddock, had for some years carried on, on the premises which are the subject of the proceedings and described as "Highbank Engineers", London Road, Purbrook, Hampshire, an engineering business doing repair work to motor cars, and, more particularly, to agricultural vehicles. The freehold of the premises of the holding is vested, and at all material times was vested, in the second of the two appellants, Mrs. Borthwick-Norton. It is for that reason, and because of that interest that she is joined in the proceedings, since the claim of the tenant, Mr. Craddock, for a new tenancy under the Landlord and Tenant Act, 1954, was a claim for a tenancy of a duration extending beyond the interest of the Hampshire County Council, the first of the appellants, themselves tenants of Mrs. Borthwick-Norton. There is, however, no issue between the county council and Mrs. Borthwick-Norton; and for the purposes of the rest of this judgment I will assume that the only party other than the tenant with whom the case is concerned is the Hampshire County Council.

On Apr. 30, 1953, the county council made a written agreement of tenancy of these premises with the tenant. The term granted to him was a single year from Oct. 1, 1952, to Sept. 29, 1953; and thereafter from year to year at an annual rent set out. The subject-matter was stated to measure 0.229 acre, and it was delineated on an attached plan. The covenants on the part of the tenant were (in addition to the normal covenants for paying rent, rates and taxes, etc.):

" 2 (vi) To keep the garage and workshop and other works and buildings erected on the land . . . in good repair and condition . . . (ix) If required by the county council and [the estate now represented by Mrs. Borthwick-Norton] to remove the buildings "

and certain other things.

The tenant continued in occupation on the terms of that document until in due course a notice of determination was given, and thereupon he applied under the Act of 1954 for a grant of a new tenancy. The notice of objection on behalf of the county council is signed by the solicitor to and clerk of the county council, and two grounds are put forward, viz., (a) that on the termination of the current tenancy they intend to demolish and reconstruct the premises comprised in the

holding or a substantial part thereof; and (b) that on the termination of the current tenancy they intend to occupy the holding for the purposes of a business to be carried on by them. Those two objections reflect the provisions of para. (f) and para. (g) of s. 30 (1) of the Act of 1954. I need not make any further reference to para. (g). Whatever else may be said about the county council and their powers and intentions in this case, it is reasonably manifest that they did not and do not intend to occupy the holding themselves for the purpose of any business of their own; that objection, therefore, goes out of further consideration. As regards the first objection, it will be noticed that in terms the objection—the draftsman having perhaps allowed his eye to be too much attracted by the language of the paragraph and too little by the actual subject-matter with which he was dealing—is said to be the intention to “demolish and reconstruct”. Nobody has the smallest doubt that it never was the intention of the county council to “reconstruct” anything. The alleged intention from the start had been—and nobody, including the tenant, had been in any doubt about it—to demolish all buildings, the so-called garage and workshop, so that the land might revert to agricultural uses unencumbered by any building. During the course of the case it was eventually conceded that the use of the words “and reconstruct” was a mistake, and that, therefore, this objection should be read as though those words had never found a place in it. Thus, the matter is reduced to this: Have the county council established, as a ground of objection, an intention to demolish the premises? I have said enough already to indicate that the premises themselves (by which I mean the whole subject-matter of the holding) are small in extent and they are (as shown on the plan) carved out of an area which is in general used for agricultural purposes by the council. More precisely, the area as a whole has been used by them in exercise of their powers and duties to provide smallholdings, which will be found in Part 4 of the Agriculture Act, 1947.

It is tolerably clear (subject to the point taken by counsel for the tenant, to which I will come in due course) that the notice served indicated that the county council were proposing to take down all these buildings (which are not either particularly elegant or firmly built, being a Nissen hut, cowsheds, and so forth) and then to use the land as part of a larger unit in exercising the powers of providing smallholdings. That fact, as I have just stated it, has raised the point which appealed to the learned county court judge, viz., that the avowed intention to demolish—assuming it was established—was merely subsidiary to the intention to let the premises to an agricultural tenant; and the learned judge thought (following *Atkinson v. Bettison* (1) to which he referred) that he must, therefore, hold that intention not to be one comprehended by para. (f) of s. 30 (1) of the Act. Counsel for the tenant, supporting that view, also said that one of these buildings certainly was originally erected as a cowshed, and there was no reason why it should not remain as a cowshed and be quite convenient as such for an agricultural tenant. In truth, said counsel for the tenant, this alleged intention to demolish is merely something asserted by the council for the purpose of getting the benefit of the Act; they are not really concerned to demolish; all they want to do is to get it back so as to be able to let it to a Mr. Mears as an agricultural tenant; and *Atkinson v. Bettison* (1), says counsel, and so said the judge, disqualifies the landlords from seeking to rely on such an intention.

Atkinson v. Bettison (1) was a case, like all these cases, in which it is first necessary to observe carefully what the facts were. It was a case in which the tenant, carrying on a provision business, applied for a new lease from his land-

lord. The landlord wanted himself to occupy the premises for his business as a jeweller, and he, therefore, said, first, that he was going to reconstruct; then he said that he was going to occupy them himself. The second point was as such no good to him because he had not acquired the premises in due time having regard to the provisions of s. 30 (2). What this court undoubtedly held was that in that case the reconstruction was in very truth something put forward to make good the defects with which the landlord was faced in relying on para. (g). As the court observed, the reconstruction was nothing more than making what was a provision shop more suitable for a jeweller's business; and in any case, therefore, the reconstruction was not of the premises or of "a substantial part thereof". It is true to say, however, that in the course of their judgments the members of this court, DENNING, HODSON and MORRIS, L.JJ., used language which seemed to indicate that, if it appeared that the reconstruction was purely ancillary to the main purpose—which was, to re-possess—that main purpose not being open to the landlord because of s. 30 (2), then the court ought not to allow the landlord to evade the difficulties he would be in under para. (g) by putting forward a specious case under para. (f). That reasoning came again before this court in a later case of *Fisher v. Taylors Furnishing Stores, Ltd.* (1); and it is to be noted that in that case two members of the court, DENNING and MORRIS, L.JJ., had been members of this court when deciding *Atkinson v. Bettison* (2). In that case it was proved to the satisfaction of the judge that the landlords intended to demolish the whole of the premises; that they could not reasonably do so without obtaining possession; and that their object was not to occupy the old building, but to rebuild on the site and to occupy the new building for the purposes of their business of furniture retailers. It then appeared that the county court judge had felt, none the less, that *Atkinson v. Bettison* (2) (and, in particular, the expressions to which I have alluded) bound him to hold that the reconstruction was ancillary to the landlord's wish to re-possess and that, since the landlord had not acquired the premises in due time, therefore he must fail. It was held that the grant of a new lease should be refused. As the landlords had established to the satisfaction of the court that they genuinely intended to demolish and rebuild the premises on the expiration of the tenancy, and reasonably required possession for that purpose, the fact that they intended to occupy the rebuilt premises themselves did not deprive them of their right to possession. The leading judgment was delivered by DENNING, L.J., who adverted to what he had said in *Atkinson v. Bettison* (2). At the beginning of his judgment I find this passage):

"The correct ground of the decision [in *Atkinson v. Bettison* (2)] was that the proposed work was not 'substantial' within s. 30 (1) (f); but the court considered also s. 30 (1) (g) and (2), which says that, if the landlord wants to get possession for his own purposes, he must have been owner for the last five years. In this connexion, the court gave an emphatic warning against allowing a landlord too easily to escape from the five-year rule. That is the full extent of *Atkinson v. Bettison* (2) and it should not be taken to decide anything more."

The learned lord justice makes certain citations from his previous judgment, and says:

"Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of

(1) [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.

(2) [1955] 3 All E.R. 340.

reconstruction, nevertheless I think that it is going too far to say that the work of reconstruction must be the primary purpose."

After saying whence the word "primary" had come and that the Act of 1954 contained provisions different from those of the Leasehold Property (Temporary Provisions) Act, 1951, which had given rise to the use of the word, he concludes:

"In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of s. 30 (1) (f) simply because he bought the premises less than five years before . . . Applying these principles, I think *Atkinson v. Bettison* (1), properly understood, did not prevent the judge giving effect to the view which he had formed."

MORRIS, L.J., gave judgment to the same effect. I will finally cite one short passage from the judgment of PARKER, L.J. He cites the language of the paragraphs and goes on:

"From the scheme of the Act as there laid down I should have thought that it was clear, apart from authority, that, if any of those grounds of objection is established, the tenant's application for a new lease must fail. Each ground is entirely separate and independent, and each, if proved, entitles the landlord to succeed. Thus, if the ground specified in para. (f) is proved to the satisfaction of the court, it matters not to what use the landlord ultimately intends to put the holding. He may intend to let it when the work is done to a third party; he may intend ultimately to occupy it himself for his own business; or he may not have made up his mind at all. To suggest that, if his intention is ultimately to occupy it himself and he cannot by reason of s. 30 (2) rely on para. (g), he is thereby debarred from relying on para. (f), is to apply a proviso to the operation of para. (f) which is not there and for which there is no warrant."

I need not refer further to my Lord's judgment because he proceeds to deal with *Atkinson v. Bettison* (1) in exactly the same way as had DENNING, L.J.

Counsel for the tenant invited us to say that that interpretation of *Atkinson v. Bettison* (1) is not really justified by the language, or some of the language, of the judgments in *Atkinson v. Bettison* (1) themselves: and that we now on this occasion should improve on the performance of DENNING, MORRIS and PARKER, L.J.J., by giving another interpretation to the earlier case. He warned us that by the rules applicable to it this court is bound by its previous decisions, right or wrong, unless, of course, they are per incuriam; that we ought to say that this court's attempt to whittle down *Atkinson v. Bettison* (1) in *Fisher's* case (2) really went too far; and that in this case *Atkinson v. Bettison* (1) should govern.

I am unable to take that view. It seems to me quite plain that we must now regard *Atkinson v. Bettison* (1) as deciding what this court said in *Fisher's* case (2) it decided, and no more. In saying that, I am not to be taken to be indicating any doubt as to the correctness of the views in *Fisher's* case (2) that I have quoted. It follows, therefore, that if the landlords here (and I am confining myself, as I said I would, to the county council) establish a genuine bona fide intention to demolish, it is not made ineffective because it is what might be called ancillary to or subsidiary to some other purpose, viz., to incorporate it in someone's agricultural holding. The learned judge thought himself bound by *Atkinson v. Bettison* (1); but unfortunately he did not appear to have in his mind (I am

(1) [1955] 3 All E.R. 340.

(2) [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.

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not sure whether his attention had been drawn to it or not when he wrote his judgment) *Fisher's* case (1), which is not referred to. I think that had he had *Fisher's* case (1) in mind he would not, and could not, have regarded *Atkinson v. Bettison* (2) as laying down a principle which compelled him to decide in the tenant's favour. I therefore think, with all respect to him, that the learned judge wrongly regarded *Atkinson v. Bettison* (2) as governing the matter or indeed as having anything to do with it.

It would still be open to the tenant to say that the intention to demolish was not really a genuine intention at all—that the council were not concerned to demolish: they were only pretending to say so, because they wanted to throw this property into an agricultural holding, and knew that unless they said that they were going to demolish they would not succeed in establishing the objection under the section. The short answer to any suggestion of that kind (and counsel for the tenant did not contend to the contrary) is that the learned judge held that there was here proved a genuine intention, a firm and settled intention, on the county council's part to demolish.

That last statement of mine remains subject to the final point which counsel for the tenant took, and it is that the county council failed to prove any such intention on their part because all that they established was an intention on the part of one of their committees, which was called the smallholdings committee. [His LORDSHIP considered the facts and rejected this argument. His LORDSHIP continued:] I add by way of conclusion that s. 30 (1) (f) (it will be recalled) refers to an intention to demolish "the premises comprised in the holding". The holding was a piece of land 0.229 acre in extent, and the buildings, the Nissen hut and the ex-cowshed, do not cover the whole of that space. There might (as was pointed out in argument) be a case in which the holding was substantially open, but on which there was one relatively small building like a pavilion on a cricket ground, and it might be said that it would be strange if it was only necessary to show an intention to destroy one relatively small building in order to justify recovering possession of a very large area. That is not the case here, and I need not pursue it. The ex-cowshed and the so-called garage cover an appreciable part of the holding, to say no more; and those premises—all of them—it is shown to be the intention of the council to demolish. No point, therefore, of the kind intimated arises here. Following what the learned judge held, viz., that the intention has been established within para. (f), I think the learned judge should have refused the tenant's application. I would therefore allow the appeal and order accordingly.

PARKER, L.J.: I entirely agree.

SELLERS, L.J.: I also agree.

Appeal allowed.

Solicitors: Walker, Martineau & Co.; Arthur S. Joseph & Cates, for MacDonald, Jacobs & Oates, Southsea.

F.G.

(1) [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.
(2) [1955] 3 All E.R. 340.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND SALMON, J.J.)

January 27, 1958

Re SAGE

Mental Defective—Detention order by magistrates—Jurisdiction to make order if "satisfied on medical evidence" offender was defective—Evidence by prison doctor that offender feeble-minded person—Consent of parent or guardian not required—Mental Deficiency Act, 1913 (3 & 4 Geo. 5, c. 28), s. 8 (1) (b).

A youth was convicted of larceny and placed on probation. He was brought before a magistrates' court to answer an allegation that he had committed a breach of the order and was remanded by the magistrates for medical examination. He was at the time aged twenty. The prison doctor, who was well acquainted with the Mental Deficiency Acts, examined the youth and at the adjourned hearing gave evidence before the magistrates that the youth was a feeble-minded person within s. 1 (1) (c) of the Act of 1913. By s. 8 (1) (b) of that Act the magistrates were empowered to make an order committing the youth to an institution for mental defectives if they were "satisfied on medical evidence" that he was a defective within the meaning of the Act. Having heard the evidence of the prison doctor, they made such an order, the consent of the youth's parent or guardian not being obtained. On application for habeas corpus,

Held: that the magistrates had jurisdiction to make the order, the evidence of the prison doctor, coupled with their own observation of the youth, being sufficient to give them jurisdiction; that the consent of a parent or guardian was not required for an order made in these terms; and, therefore, that the application for habeas corpus must be refused.

APPLICATION for an order for the issue of a writ of habeas corpus.

On Oct. 15, 1952, the applicant was charged at Bearsted magistrates' court with stealing two and a half pints of milk; he pleaded Guilty to the offence and was convicted and placed on probation for one year. The applicant did not fulfil the terms of his probation in that he failed to notify the probation officer of his change of address, and on Jan. 13, 1953, he was brought before Cranbrook magistrates' court as the supervising court to answer an allegation that he had committed a breach of the probation supervising order. The court found the allegation proved. At that time, the applicant, who was just twenty, was living in a hut on a farm, and the magistrates, having had an opportunity of observing him in court, remanded him in custody for a medical report to Canterbury Prison where he was examined by the medical officer. The report of the medical officer, dated Jan. 22, 1953, which was sent to the magistrates' clerk, stated that the applicant

"was unable to interpret pictures which showed, without explanation, their meaning to an ordinary observer. He could not arrange in order a simple sentence of disarranged words. He appeared unconcerned at his present situation. His backwardness is not the result of insanity, but is clearly the result of mental defectiveness and his reasoning and judgment are grossly impaired. I am of opinion that he is a feeble-minded person within the meaning of the Mental Deficiency Acts and that he requires institutional care and treatment."

On Feb. 2, 1953, the applicant appeared on remand at Cranbrook magistrates' court where the medical officer who had examined the applicant at Canterbury Prison gave evidence, merely stating that the applicant was a feeble-minded person within the Act, viz., the Mental Deficiency Act, 1913. The magistrates, being satisfied that the applicant was a defective within the meaning of the Mental Deficiency Act, 1913, made an order under s. 8 (1) (b) of that Act that he

be sent to an institution for defectives, Leybourne Grange, West Malling, Kent. The consent of the applicant's parents or guardian was not obtained to the making of the order. By a further order dated Nov. 11, 1953, made by the Board of Control, the applicant was transferred to Moss Side Hospital, Maghull, near Liverpool. The applicant obtained leave to apply for a writ of habeas corpus directed to the Board of Control and the superintendent of the hospital on the grounds that the magistrates had no jurisdiction to make the order as there was insufficient evidence before them on which they could conclude that the applicant was a defective, and, further, that the consent in writing of the applicant's parent or guardian had not been obtained before the order was made.

Pain for the applicant.

Rodger Winn for the respondents.

LORD GODDARD, C.J.: The court is asked to issue a writ of habeas corpus to bring up and discharge Cyril Montague Sage who, on Feb. 2, 1953, was committed by the Cranbrook magistrates under s. 8 of the Mental Deficiency Act, 1913, to an institution for mental defectives. The boy had been before the court previously on a charge of larceny and had been put on probation. He had not fulfilled the terms of his probation and was therefore brought by the probation officer before the supervising court. The magistrates remanded him for a medical report because they wanted to know whether he was or was not a mental defective. It is to be observed that the court had an opportunity of seeing the boy in court and hearing about him. He was remanded to H.M. Prison, Canterbury, to see the prison doctor, who was a man well acquainted with the Mental Deficiency Acts and had the medical experience necessary to enable him to give evidence on these matters. The doctor came before the court and said that this boy was a feeble-minded person within the Mental Deficiency Act, 1913. Assuming that that is exactly what the doctor said, it is only a compendious way of saying that he had examined the boy and had come to the conclusion that the provisions of the Act applied to him, and that the boy was a person who could properly be dealt with by the court under the Mental Deficiency Act, 1913.

We are asked to say that there was no evidence which would justify the magistrates in making the order. We take a contrary view. We think that on the evidence of the doctor and their own observation it was open to the magistrates to make that order. On an application for habeas corpus we have to see whether the detention is lawful. The detention is lawful here because an order which Parliament has authorised to be made under s. 8 of the Mental Deficiency Act, 1913, was made. If it could have been shown that the magistrates had made the order without evidence, we could have gone behind the order and interfered, but it is clear in this case that the magistrates had evidence on which they could make the order.

The last point put by counsel for the applicant was really, if I may say so, raised as a matter of despair. It is said that if a petition is presented for the detention of a person under s. 5 of the Mental Deficiency Act, 1913, that is to say, a person who is not alleged to be guilty of any offence, but where the magistrates are simply being asked to make an order that a person should be taken to an institution for mental defectives, the consent of the parent or guardian must be obtained or it must be shown that the parent could not be found or that the parent was unreasonably withholding his consent. Of course that does not apply when magistrates have to decide what is the proper order to make in respect of a boy for a breach of the criminal law. The magistrates' court is not bound to consult the parent whether he likes or wishes the court to pass a particular sentence. What s. 8 (1) (b) of the Act of 1913 says is that the court

itself may make any order, which if a petition was presented, the judicial authority might have made. If the judicial authority are to make an order under s. 6, a petition has to be presented. The magistrates have to make the same order which could be made if the judicial authority had a petition duly presented to them. It is not for the magistrates' court in making up their minds whether the prisoner ought to be dealt with as a mental defective to consider whether or not a petition has been duly presented or what would have happened; they are entitled to make the same order as if a petition had been duly presented. It is not necessary for them to ask anything of the parent or guardian.

In the opinion of this court, there is no ground for granting habeas corpus in this case. In our opinion the applicant is lawfully detained under the Act of 1913, and this application fails and is dismissed.

HILBERY, J.: I agree.

SALMON, J.: I agree.

Application dismissed.

Solicitors: *Walter Stein & Grover; Solicitor, Ministry of Health.*

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHERD, M.R., PARKER AND SELLERS, L.JJ.)

January 27, 1958

Re D (an infant)

Adoption—Dispensing with consent—"Consent . . . unreasonably withheld"—Illegitimate child—Refusal by putative father—Adoption Act, 1950 (14 Geo. 6, c. 26), s. 2 (4) (a), s. 3 (1).

The putative father of a boy aged three was serving a life sentence for having murdered the boy's mother. He refused his consent to the adoption of the boy on the sole ground that he loved his son.

HELD: the welfare of the child was the primary consideration; the putative father had not the same right as a lawful parent; and, his consent was unreasonably withheld and should be dispensed with.

APPEAL by the applicants from an order of His Honour JUDGE HARCOURT BARRINGTON, at Woolwich County Court, dismissing their application to adopt an infant.

Stott for the applicants.

J. Sofer for the respondent.

LORD EVERSHERD, M.R.: In the very strange circumstances of the present case I have come to a clear conclusion that the learned county court judge, with all respect to him, fell into error and misdirected himself on a vital matter. The case is one which arises under the Adoption Act, 1950, two paragraphs of which require some consideration. The case concerns a little boy who will shortly be three years old. He was, unhappily for him, the fruit of an illicit union between his mother and the respondent. The application which has given rise to this appeal is an application by two persons, husband and wife, for an order under the Act of 1950 for the adoption of this child. It is right

that it should be said at once, as the learned judge said, that there is nothing whatever that could be said against these two applicants; and, indeed, as it seems to me, much that could be said for them. The respondent (the putative father) opposed the application, and according to the judge's note he did so apparently on two grounds, though the second ground was that which he himself put in the forefront of his opposition.

The respondent came from India, being one of a substantial family with four brothers and four sisters. He told the learned county court judge that his "big sister", a lady aged about thirty, who was unmarried, intended, in connexion with a business with which she was concerned, to come over to England, that she would work here and get someone to look after the boy while she was at work, and that she would be in effect the child's foster mother. At the end of his evidence the respondent used this phrase: "I want my sister to have the child because he is my son, and I love him. That is the sole reason I oppose the adoption". At this stage I must advert to certain other very lamentable circumstances in the case. It appears that after the birth of this child, the mother applied to the Fulham magistrates in June, 1955, who made an order on the respondent that he pay 30s. a week for the infant's maintenance. He did so for some time, and then ceased. According to his evidence (and, as the learned judge points out, it is not controverted) he ceased to pay because the mother said: "Don't go on paying because I am going to Scotland on a visit and shall be leaving the child with somebody in Earls Court. When I come back, we will be married". She did not come back and marry the respondent. She appears to have married someone else, and the respondent murdered her. He was convicted of that murder, but the capital sentence was not carried out. He is now serving a life sentence in Her Majesty's prison. It is, no doubt, true that in the case of a man serving a life sentence, it does not at all follow that he will remain in prison for the rest of his days. He said somewhat blandly in the course of his evidence: "I have not been told when I can expect release from prison". Indeed, I have been forced to wonder if he regards murder as a really serious matter—as serious, say, as dipsomania, which might in certain cases deprive the father of a legitimate child of the right to look after it. It is, however, quite certain that, having murdered the child's mother, he is (and in the foreseeable future is likely to remain) in a position in which he would be quite unable to perform any parental obligations towards the child, or in which any ties of affection could conceivably flourish at all. Still, he opposed the application, and I have referred to the reason for his opposition. On his behalf it may perhaps fairly be said that the mother did not do well by him; that, of course, cannot possibly excuse his conduct.

Two points arise on the paragraphs in the Act, and before I state them I must refer to the paragraphs themselves. By s. 2 (4) of the Act it is provided:

"Subject to the provisions of s. 3 of this Act, an adoption order shall not be made—(a) in any case, except with the consent of every person or body who is a parent or guardian of the infant or who is liable by any order or agreement to contribute to the maintenance of the infant . . ."

Section 3, which was anticipated in the paragraph that I have read, provides in sub-s. (1), so far as relevant:

"The court may dispense with any consent required by para. (a) of sub-s. (4) of s. 2 of this Act if it is satisfied . . . (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld."

The first question which was before the learned judge, and which counsel for the applicants intimated that he would desire to put before us, is whether on the facts of this case the respondent is a person "who is liable by virtue of any order to contribute to the maintenance of the infant". He puts forward the point that at the relevant date the respondent, having murdered the mother, had ceased, therefore, to be under an obligation to pay the maintenance. It was, therefore, questioned what was the effect of the murder of the mother on the obligations under the order on the father: did they survive, or did they not? If the true view is that at the relevant date the respondent could not be said to be a person "liable by virtue of any order to contribute to the maintenance of the infant", then his consent was no longer required under the section. We have not heard argument on that point, which the judge decided or assumed in the respondent's favour, and, therefore, I say nothing further about it, because in my judgment it is sufficient to say that if the father is a "person" within s. 2 (4) (a), on the facts of this case his consent was unreasonably withheld within the terms of s. 3 (1) (c); and it is on that point—whether consent was or was not unreasonably withheld—that the present argument has been put before us.

The learned judge in concluding, as he did, that the refusal on the respondent's part was not unreasonable, directed himself as follows. He said that since the respondent is within s. 2 (4) (a)—i.e., that he was a "person" comprehended by that paragraph—"he must qua parent be treated on the same footing as a legal parent for the purpose of deciding whether his consent is being unreasonably withheld; that is, the principle of *Hitchcock v. W.B. & F.E.B.* (1) applies, and the test is whether his attitude, as a father, in refusing consent, is unreasonable", and the learned judge referred to a passage in the judgment of DEVLIN, J., in that case. With the greatest respect to the learned judge, I think it is at that point that he fell into error, for I do not agree that the principle of *Hitchcock v. W.B. & F.E.B.* (1) applied, and I do not agree that because the respondent was (as we assume) a "person" within s. 2 (4) (a), for the reasons that I have stated, he must, therefore, qua parent be treated on the same footing as a legal parent. *Hitchcock v. W.B. & F.E.B.* (1) was a case of a legitimate child. It was a case in which an order for custody had been made by justices in favour of the child's mother, and thereafter application was made for the child's adoption. Having become separated from the mother, the father objected. The magistrates had taken the view that by reason of the order for custody, the father's objection should be disregarded and held unreasonable. The Divisional Court did not take that view; they came to the conclusion on the evidence that it was a case in which, though the father had had in the past a somewhat shady career, he had pulled himself together, was working well and satisfactorily, and was in a position to make proper provision for the child and look after him. More important than that, however, the court observed that the father was the child's father, having the rights of parenthood which belonged to the father of a legitimate child; and, there being no disqualification—for it was at this point that reference by way of example was made to dipsomania being a disqualification which might prevent the father *prima facie* from exercising those natural and legal rights—therefore, it was not right that his consent should be disregarded. In my judgment, that case, and the principle of it, has no application to the present. It depended first and last on the circumstance that the father in *Hitchcock v. W.B. & F.E.B.* (1) was the father of a legitimate child, claiming as such to exercise his parental rights. In the present case, the respondent is not here as the father of a legitimate child, but as the putative father of an illegitimate child; and this court

has decided in *Re M. (an infant)* (1) that the putative father of an illegitimate child, for the purpose of the Adoption Act, 1950, has not the rights of a parent. More precisely, the word "parent" in s. 2 does not comprehend the father of an illegitimate child, and so he cannot come to court and claim (as could the father of a legitimate child) to exercise the parental rights which would then belong to him. As PARKER, L.J., pointed out in the course of the argument, that position under the Act is emphasised if one looks, e.g., at s. 5 of the Act where parental rights are spoken of in circumstances which quite clearly exclude the consideration of someone in the situation of the respondent in this case. Indeed, counsel for the respondent has not argued to the contrary so far; he concedes that the learned judge at this point fell into error in saying that the principle of *Hitchcock v. W.B. & F.E.B.* (2) applied. But counsel has, none the less, contended that one cannot sensibly treat the respondent as though he was a total stranger. He observes that had the respondent taken steps to make the child a ward of court, the views that he put forward for the child's welfare would be entitled to receive consideration from the court. That, no doubt, is so. The respondent has not in fact taken any such step. I venture to think that at the most that argument cannot get counsel beyond this point, that, since we are not here concerned with any parental rights which would be taken away by the adoption, the primary test at any rate (without putting it any higher) of the right order to make is that of the welfare of the infant; and again in that I think I am saying no more than counsel for the respondent has said.

Looking at the matter from that point of view, therefore, what is the answer? It will be recalled that in putting his case before the learned county court judge, the respondent had informed the court of the pending arrival in England of his sister. For some reason that did not take place; the sister appears still to be in India, and all we know is that she has suggested that the child might be sent to India. Counsel for the respondent says that he has some further information, and his suggestion was that, in the interests of the child, it was desirable that this matter should be re-heard. I am not persuaded that that is so. I think that in the circumstances of this case an end should be made of this matter, and that an order should be made in favour of the applicants. One reason for that view (and it will suffice) is that so far as I can see in the very peculiar circumstances of this case, where nothing whatever can be said, from the child's point of view, against the adopters, the welfare of the child seems to me almost overwhelmingly to point in favour of an order being made, and made now. After all, if such an order is not made, what is going to be this child's future? He is going to be brought up by some relative of the respondent. He will clearly not at any relevant age, so far as I can see, be able to enjoy anything comparable to a father's affection and protection. On the contrary, he will inevitably find out sooner or later (and probably sooner) that he is the illegitimate child of a union, the mother of which was murdered by the father, which father is serving a life sentence for that offence. I cannot think that bringing the child up in that state of affairs would be to his advantage. Indeed, it may well be that here, even if the respondent could assert the rights of what I will call a legitimate father, the fact of his having murdered the boy's mother (for which offence he was imprisoned for life) would itself—the other circumstances in this case being the same—disqualify the father from successfully refusing his consent. But it is unnecessary to go so far because, as I have more than once said, the respondent here can assert no parental rights; and, once that is out of the way, it

(1) 119 J.P. 535; [1955] 2 All E.R. 911; [1955] 2 Q.B. 479.
 (2) 116 J.P. 401; [1952] 2 All E.R. 119; [1952] 2 Q.B. 561.

appears to me, I confess, tolerably plain in the very singular, indeed very distressing, circumstances of this case that there is an overwhelming advantage from the infant's point of view in taking advantage of the generous offer of the applicants, and making an order in their favour. I would, therefore, allow this appeal, and make an adoption order accordingly.

PARKER, L.J.: I entirely agree. It seems to me clear that the learned county court judge, in considering whether consent had been unreasonably withheld, fell into error in treating the test as the same in this case as in the case of a parent. He approached the matter on the principles laid down in *Hitchcock v. W.B. & F.E.B.* (1), which was the case of a parent as opposed to a putative father, and, applying that test, held that consent was not unreasonably withheld. I think it is clear that in a case, such as this, of a putative father, the primary consideration, if not the only one, must be the welfare of the infant; and as to that, it appears to me that the case is overwhelmingly made out in favour of adoption. I would add that if one applied the tests laid down by **DEVLIN, J.**, in *Hitchcock v. W.B. & F.E.B.* (1), it seems to me that, even if this respondent had been the parent, he would certainly still have unreasonably withheld consent. Accordingly, I would allow the appeal.

SELLERS, L.J.: I entirely agree, and I do not think that I can usefully add anything to the reasons given by my Lords.

Appeal allowed.

Solicitors: *Braund & Fedrick; Pratt & Sidney Smith.*

F.G.

(1) 116 J.P. 401; [1952] 2 All E.R. 119; [1952] 2 Q.B. 561.

QUEEN'S BENCH DIVISION

(BARRY, J.)

January 27, 28, 29, 1958

KUCHENMEISTER v. HOME OFFICE AND ANOTHER

Alien—Detention—Alien landing at approved airport in United Kingdom in transit to another country—Landing for sole purpose of embarking in an aircraft at same airport—Alien detained by immigration authorities for period preventing his embarkation in outward aircraft—No refusal of leave to land—Legality of detention by immigration authorities—Aliens Order, 1953 (S.I. 1953 No. 1671), art. 2 (1) (b).

By the Aliens Order, 1953, art. 2 (1) (b), leave to land in the United Kingdom is not required in the case of an alien "who lands from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port" and remains between his landing and embarkation within "limits . . . approved . . . by an immigration officer". The plaintiff was a German citizen living in Dublin and was a person to whom leave to reside in or visit the United Kingdom would be refused by the immigration authorities. On Apr. 27, 1955, he was travelling back from Amsterdam to Dublin on a route booked with a Dutch airline and had been informed that he did not need a British visa. On that particular flight the Dutch aircraft landed at the northern section of London Airport (which was an approved port) and passengers to Dublin were to complete their journey by Aer Lingus aircraft flying from the central section of the airport. Between the two

sections of the airport was a road about a mile long within the perimeter of the airport, but there were no physical controls preventing egress outside the airport by a passenger going from one section to the other. The plaintiff having disembarked at London Airport for the sole purpose of flying on to Dublin, was detained by the immigration authorities in the buildings of the northern section for nearly two and a half hours. He was then conducted by an immigration officer to the central section to join the Aer Lingus aircraft which was about to leave from that section. He arrived too late to be allowed to board the aircraft and had to remain at the airport until the next aircraft left for Dublin on the following morning. At no time did the immigration authorities either grant him or refuse him leave to land. In an action for damages for false imprisonment against the Home Office and the senior immigration officer at the northern section of London Airport.

Held: the plaintiff was entitled to damages for false imprisonment because his detention for so long a period was illegal, the immigration authorities not being entitled to exercise the discretion conferred on them by art. 2 (1) (b) of the Aliens Order, 1953, as to the premises on which an alien might remain so as to frustrate the purpose for which para. (b) had been included in the Order, viz., allowing aliens to land without leave for the purpose of embarking on another aircraft.

Action by the plaintiff, Carl Walter Kuchenmeister, claiming damages against the defendants, the Home Office and John Malcolm, the senior immigration officer in the northern section of London Airport, in respect of what he alleged to be his false imprisonment at London Airport, Hounslow, Middlesex, on Apr. 27, 1955.

The following facts were found by BARRY, J. The plaintiff was a German citizen who, being in England in 1939, was interned until March, 1947. After his release from internment, he was required to leave England, and, although the authorities in England were anxious that he should return to Germany, he managed to obtain a visa to enter Eire and now lived in Dublin where he carried on an engineering business; he was a person who was fully acceptable to the authorities in Eire, although the immigration authorities in this country had instructions to refuse him leave to land in England because of his previous history. In April, 1955, he decided to visit the Hanover trade fair, and, accordingly, he booked a return through air ticket from Dublin to Amsterdam, travelling from Amsterdam to Hanover by train. Having travelled on the outward journey, on Apr. 24, in a K.L.M. plane from Dublin to Amsterdam, stopping on the way at Manchester airport, without incident, he decided to return to Dublin on Wednesday, Apr. 27. On arriving at Amsterdam on the homeward journey, he was told that the flight to Dublin would be made via London and not via Manchester, but he was not informed that this would entail changing from the K.L.M. plane from Amsterdam to an Aer Lingus plane at London Airport, as was the fact. Before embarking at Amsterdam for London on the K.L.M. plane, he was told that he would not require a British visa, and while landing cards were issued to passengers on the K.L.M. plane who were travelling to the United Kingdom, he, on showing the air hostess his through ticket to Dublin, was not given a landing card; nor were the other passengers on the plane who were bound for Eire. The K.L.M. plane landed at London Airport at about 6 p.m. on Apr. 27, the plaintiff having a passage booked on an Aer Lingus plane which was due to leave London Airport at 8.45 p.m. that day. Passengers who were travelling on the Aer Lingus plane were asked to check in forty minutes before its departure.

At Manchester airport, where he had previously landed in transit, there were no difficulties regarding transit passengers in respect of whom there were instructions to refuse leave to land in England because, there, passengers were disembarked and re-embarked without leaving the tarmac and were kept segregated while at the airport; but the position at London Airport on Apr. 27 was different. London Airport, which was an "approved airport" within the

meaning of the Aliens Order, 1953, was divided into two sections, the northern and the central section which were some distance apart, and access between the two sections was obtained by a road within the perimeter of the airport which travelled through a tunnel and across the airport for about one mile. The northern section of the airport was near to the public highway and there were no physical controls to prevent someone who was travelling on the road between the two sections from walking out of the airport. On Apr. 27, the K.L.M. company were operating their planes from the northern section of the airport while Aer Lingus were operating their planes from the central section; it was, therefore, necessary for the plaintiff, in order to continue his journey from London Airport to Dublin, to proceed from the northern to the central section of the airport. Having disembarked from the K.L.M. plane at the northern section, the plaintiff, with other passengers from the plane, was taken to the arrival lounge in that section and from there he was taken to be interviewed by the immigration officers. He showed his German passport and certificate of registration under the Aliens Order, 1920, to one of the officers and was then asked for his landing card, but, having told the officer that he did not have a card, he was asked to complete one and, in answer to one of the questions on the card relating to his proposed address in the United Kingdom, he wrote "None; in direct transit to Dublin only". He was then seen by another immigration officer, Mr. McHugh, who consulted a reference book in which, it was the plaintiff's impression, he found the plaintiff's name; immigration authorities had available to them particulars of those aliens to whom they were to refuse leave to land. Thereafter the plaintiff was kept waiting on a chair in the corner of the room; he protested several times that he had no intention or wish to enter this country, that he was in transit and that he failed to understand why further inquiries about him were necessary. In due course all the other passengers were cleared and he was left sitting alone in the room. When it was 8 p.m., he told the officers that he had to check in with Aer Lingus before boarding the plane on which his passage was booked and which left at 8.45 p.m., but he was still told that he must wait, and finally, at 8.25 p.m. a Mr. Wysman, an immigration officer, said that he would take the plaintiff to the Aer Lingus checking-in desk in the central section of the airport and would try to get him aboard his plane, but, although Mr. Wysman did everything he could to enable the plaintiff to board the plane which was then about to depart, owing to the fact that the central section had only recently begun to operate and to the fact that Aer Lingus were operating a new type of aircraft, he was unsuccessful in his efforts and the plane departed without the plaintiff. He was driven back to the northern section where he waited for about forty minutes and was then driven back again to the central section and taken to the transit lounge where he remained for the night. He was made as comfortable as possible; there was a bar in the lounge and refreshments were available, as was lavatory accommodation. The next morning, viz., Apr. 28, he was put on an Aer Lingus plane which left London Airport at 7.45 a.m., and his passport, certificate and papers were returned to him. As a result, he missed some appointments which he had in Dublin in the early part of the morning of Apr. 28, although he did not claim that he thereby suffered any direct pecuniary loss. He was never either refused or granted leave to land at London Airport.

The evidence for the defendants showed that, when the plaintiff filled up his landing card, one of the immigration officers in the northern section of the airport, Mr. McHugh, realised that there were instructions issued to the immigration authorities regarding the plaintiff. Having looked these up in his office, Mr. McHugh reported the matter to Mr. Malcolm, the senior immigration officer

in the northern section of the airport and one of the defendants to the action. Mr. Malcolm instructed Mr. McHugh to ask the plaintiff about his antecedents, whereon the plaintiff embarked on a long history of himself, which dated back to before the war. Mr. Malcolm then instructed Mr. McHugh to telephone the department of justice in Eire who stated that they had no objection to the plaintiff being allowed to continue his journey to Dublin and landing there. Mr. Malcolm gave evidence to the effect that the plaintiff's position was an exceptional one as, while he was a person regarding whom there were instructions to refuse leave to land in England, yet he had a genuine desire not to remain in this country, but to proceed with his flight to Dublin. Unless the plaintiff was given leave to land, there were grave difficulties in allowing him to proceed along the road from the northern to the central section of the airport. Mr. Malcolm thought that, in law, his duty was to return the plaintiff to Amsterdam, but he told the plaintiff that, if he wished, he would seek higher authority to allow him to proceed to Dublin. This, in fact, Mr. Malcolm did, and it was intimated to him by the Home Office, at about 8.20 p.m. on Apr. 27, that the plaintiff could proceed to the central section of London Airport and there embark on the Aer Lingus plane on which he had his passage booked.

In the above circumstances, the plaintiff claimed damages in respect of the period that he was detained at London Airport, contending that that detention amounted to false imprisonment; the defendants contended that the plaintiff was properly detained at the airport under powers contained in the Aliens Order, 1953.

Scarman, Q.C., and *W. A. B. Forbes* for the plaintiff.

The Solicitor-General (Sir Harry Hyllton-Foster, Q.C.) and *Rodger Winn* for the defendants.

BARRY, J., stated the facts, considered the evidence which was given by the defendants' witnesses, and continued: It is right for me to say this. I am quite satisfied that throughout Mr. Malcolm and the other officials concerned regarded themselves as being in a somewhat difficult position. On their view of their duties under the Aliens Order, 1953, they were under the impression that, in strict law, the plaintiff was not entitled to travel from the northern buildings to the central buildings and so to embark on the Aer Lingus flight. Being faced with that difficulty (which, in their minds at least, was a genuine difficulty) I am satisfied that they did their best to secure that the plaintiff was put to as little inconvenience as possible and tried, to the best of their ability, to ensure that he did in fact catch the aircraft which took off at 8.45 p.m. However, owing to the various activities to which I have referred, their hope that the plaintiff would be in time to catch that aircraft was not fulfilled.

The question which I have to consider is whether Mr. Malcolm and his officials correctly interpreted their powers and duties under the Aliens Order, 1953. If in fact they incorrectly interpreted their powers and duties, that would not be a very surprising feature of the case. The exact effect of the Order of 1953 on circumstances of the kind now under consideration is by no means free from doubt. I have had the benefit of an argument as to the correct interpretation of the order which has lasted some two and a half days. I am now about to express my views with regard to it, having had the advantage of that argument. Even with that advantage I do not pretend that I have complete confidence in the interpretation which I propose to adopt. It may well be that elsewhere my interpretation will be found to be wrong. In these circumstances, I am bound to say that I think no possible blame can attach to Mr. Malcolm for any misapprehension which he may have had as to the real meaning of this order.

The Aliens Order, 1953, was made under the powers conferred on the Crown to make regulations by Order in Council imposing restrictions on aliens. That power is to be found in s. 1 of the Aliens Restriction Act, 1914, as at present amended by the Aliens Restriction (Amendment) Act, 1919. The order that I am about to construe was, as I have said, made in 1953, and it provides, under art. 1 (1):

"Subject to the provisions of this order, an alien shall not land or embark in the United Kingdom except with the leave of an immigration officer, and shall not so land or embark elsewhere than at an approved port or at such other place as an immigration officer may in any particular case allow."

I need not read the rest of art. 1, which defines the words "land" and "embark", and which empowers the Secretary of State to designate the ports and airports which can be regarded as approved. In fact, by a subsequent statutory instrument, the Aliens (Approved Ports) Order, 1954, the Secretary of State approved London Airport as being one of the approved airports within the meaning of art. 1 of the Order of 1953.

Article 2 of the Order of 1953 reads:

"Exception for certain aliens landing temporarily. (1) Subject to para. (2) of this article, leave to land shall not be required under art. 1 of this order . . . (b) in the case of an alien who lands from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port, and remains, throughout the period between his landing and embarkation, within such premises or limits as may be approved for the purpose by an immigration officer."

That is the article, art. 2 (1) (b), on which the plaintiff founds his case.

Paragraph (2) of art. 2 of the Order of 1953 reads:

"Notwithstanding anything in para. (1) of this article, an immigration officer may at any time—(a) give notice to an alien who is for the time being on board a ship or aircraft prohibiting him from landing without leave thereunder; or (b) grant or refuse leave to land to an alien who is within the United Kingdom after landing without leave thereunder; and thereupon the said para. (1) [of art. 2] shall cease to apply to the alien."

Then there is art. 3, which deals with the common travel area, and I think it is conceded that by virtue of the provisions of that article the plaintiff did not require leave to embark from the United Kingdom. The only requirement, if any, was the requirement of a leave to land.

The next material article of the Aliens Order, 1953, is art. 7. Paragraph (1) of that article requires every person over sixteen to produce certain documents, including a passport, to an immigration officer if so required. Paragraph (2) of art. 7 requires those same persons to give information asked for by the immigration authorities. Paragraph (3) of art. 7 reads:

"Notwithstanding anything in art. 1 of this order, an alien may land, without the previous grant of leave to land, for the purpose of examination under this article in accordance with arrangements in that behalf approved by an immigration officer, and if he submits himself forthwith to such examination shall be deemed for the purposes of this order not to have landed unless and until such leave is granted to him; and an alien who lands as aforesaid may be detained, pending and during the examination, under the authority of an immigration officer."

Therefore, para. (3) of art. 7 gives an express power of detention to immigration officers in the case of aliens who land without previous grant of leave for the

purpose of examination under art. 7. At one time the provisions of para. (3) of art. 7 were relied on by the defendants as a justification for the plaintiff's detention, but in my judgment it is clear that the provisions of para. (3) of art. 7 relate solely to aliens who land for the purpose of being examined under the provisions of that article, and I am quite satisfied that the plaintiff did not land for that purpose but for the purpose—and the sole purpose—of embarking in an aircraft at the same port as that in which he had arrived.

Certain other express powers of detention are given to immigration authorities under the Aliens Order, 1953. Article 8 refers to the removal of aliens from the country who have been refused leave to land. I need not refer to the first three paragraphs of art. 8 but para. (4) thereof reads:

"An alien to whom leave to land is refused may be detained, under the authority of an immigration officer, pending the giving of directions in his case under para. (1) of this article and pending his removal in pursuance of directions so given; and where any such alien is on board a ship or aircraft he may, under the like authority, be removed therefrom for detention under this paragraph."

Now, it is quite clear that at no time during the course of this ill-fated visit to London Airport was the plaintiff refused leave to land, and in those circumstances it is clear, in my judgment, that para. (4) of art. 8 has no application to the facts of the present case.

Article 9 relates to aliens who have landed unlawfully in this country, and again confers certain powers on immigration authorities and others. In the present case it cannot be suggested that in the first instance at least the plaintiff landed unlawfully in this country. He landed, it is true, without having obtained leave to do so, but he landed, as I find—and as, indeed, very soon became apparent to the immigration authorities—from an aircraft at an approved port for the purpose only of embarking in an aircraft at the same port. In those circumstances, under the provisions of art. 2 (1) (b), his landing was lawful, as no leave to land in those circumstances, under art. 1 of the Order of 1953, is required. Further than that, there is no evidence that during any part of his enforced sojourn at London Airport he failed to remain within such premises or limits as were approved for the purpose by an immigration officer. Therefore, it cannot be suggested that at any period the plaintiff was in the position of an alien who had landed unlawfully or, as I have said, of an alien to whom leave to land had been refused. Similarly, it is right to say that the plaintiff was never in the position of an alien to whom leave to land had been granted. It is quite clear from Mr. Malcolm's evidence and from a report made by Mr. McHugh on this whole incident on Apr. 29, 1955, that leave to land was at no time either given or refused.

Now, the gist of the problem is this: The defendants' contention is that it is within the sole discretion of the immigration authorities to lay down the prescribed limits or premises in which an alien landing under the provisions of art. 2 (1) (b) of the Order of 1953 may remain. For various reasons, some of which are obvious, Mr. Malcolm considered that aliens landing at the northern section of the airport should be confined to the transit hall and certain other buildings in that section of the airport. His view was, and the defendants' view is today, that if aliens were allowed to stray beyond those very narrow limits and wander off unescorted towards the central buildings, all effective control over their movements would be lost, because unless a policeman was sent to accompany them it was perfectly open to them never to proceed to the central buildings at all but to walk out of the airport and so travel to any part of

England. "In those circumstances", say the defendants, "we were entitled to say that, having landed—and lawfully landed—under art. 2 (1) (b), the plaintiff was bound to remain in the transit lounge, or certainly in some part of the buildings of the northern section of the airport. All we did was to confine him within that perimeter, and in the circumstances it cannot possibly be alleged that we were guilty of any unlawful or enforced imprisonment. The plaintiff's rights were limited. He could only pray in aid art. 2 (1) (b) of the Order of 1953 so long as he remained for the whole period between his landing and embarkation within such premises or limits as may be approved for the purpose by an immigration officer, and the fact that remaining within those limits caused him to lose his flight to Dublin is a very unfortunate fact but one which was quite unavoidable and about which the plaintiff has no legal ground for complaint". According to the defendants' view, if the plaintiff was to proceed outside the narrow confines of the northern buildings, or such parts of the northern buildings as were approved by the immigration authorities, he required leave to land. He never obtained leave to land, and in those circumstances no wrong has been done to him by insisting that he remain until some time about 8.30 that evening in those northern buildings.

Counsel for the plaintiff puts the case in this way: The plaintiff was undoubtedly detained in the northern buildings at the airport, and detained for so long a period that he was unable to catch the aeroplane on which his passage from London to Dublin had been booked. The defendants, says counsel, must justify that detention. Certain grounds on which they sought to justify it have been shown to be unsound. As I have already indicated, art. 8 (4) of the Order of 1953, one of the articles which provides an express power of detention, only applies to aliens refused leave to land; and para. (3) of art. 7 which again provides an express power of detention, relates only, as I have found, to aliens who have landed for the purpose of examination under art. 7.

Counsel for the plaintiff concedes that the defendants could have provided themselves with a justification for the plaintiff's detention, because it is I think conceded on all hands that the powers conferred on the immigration authorities by art. 2 (2) could have been utilised at any period during the evening with which we are concerned. It would have been open to Mr. Malcolm and the officials under him at any time during that evening to refuse the plaintiff leave to land, even though he had in fact landed lawfully under the provisions of para. (1) of art. 2. Further than that, of course, they could have prevented him from leaving the aircraft at all by acting under sub-para. (a) of art. 2 (2). Counsel for the plaintiff's case is, however, that unless the immigration authorities elected to proceed under para. (2) of art. 2, they cannot by indirect means secure the detention of an alien by a quite arbitrary exercise of their discretion under art. 2 (1) (b). This brings me to the one vital question in this case—assume that the immigration authorities do not put into operation their powers to grant or refuse leave to land, can they, by an exercise of their discretion as to the premises or limits within which an alien who has landed under art. 2 (1) (b) may remain, effectually defeat the purpose for which the alien in fact landed under that paragraph, namely, for the purpose of embarking in an aircraft at the same port? If they can do so, then the plaintiff has no possible ground for complaint in law, however much he may feel that this was an unreasonable exercise of the powers conferred on the immigration officials. If they cannot do so, then what are the justifications for the plaintiff's detention during this very considerable period—upwards of two-and-a-half hours—in the buildings in the northern section of the airport?

I have come to the conclusion that, subject of course to all the other powers which are vested in them, the immigration authorities cannot so exercise the discretion conferred on them by the latter limb of art. 2 (1) (b) as to frustrate the purpose for which sub-para. (b) was (I do not say "enacted", because it is not an Act of Parliament) included in the Order of 1953. As I see it, the policy of the Aliens Order, 1953, is that an alien should be allowed to land without leave under certain limited conditions, all but one of which the plaintiff has admittedly fulfilled. He landed from an aircraft, he landed at an approved port, and, as was very soon apparent to the immigration officials, he landed for the purpose only of embarking in an aircraft at the same port. Having fulfilled those conditions, were the defendants or the immigration officials entitled to prevent him from carrying out his purpose by limiting the premises or limits within which he might remain between his landing and embarkation in such a way as to render his embarkation impossible? In my judgment they were not. As I see it, this provision—that is to say, the provision contained in art. 2 (1) (b)—was inserted in the Order of 1953 to confer the privilege of landing without leave on a certain limited class of aliens who were entering the approved airport not for the purposes of visiting the United Kingdom but merely in transit to some other area outside the United Kingdom. It is true that sub-para. (b) of art. 2 (1) does confer a discretion on the immigration authorities as to the premises or limits in which the alien may remain while he is on British soil, but I accept counsel for the plaintiff's argument that that discretion in effect relates to the geographical situation of the premises or limits in which that alien may be. I do not think that the word "may" confers so wide a discretion on the immigration officials that they may purely capriciously say: "We are going to limit the area in which the alien may remain in such a drastic way that he is faced with the alternative of either returning from where he came or remaining permanently detained in a small area of the airport from which access to the aircraft in which he wishes to continue his journey cannot be obtained".

The conditions imposed on the alien, if he is to take advantage of this enabling order, are conditions which he must fulfil. The alien must land from an aircraft, he must land at an approved port, and he must land for this very limited purpose referred to in sub-para. (b) of art. 2 (1). He must also remain within the approved premises or limits. All those are obligations imposed on the alien, and unless he complies with those obligations he cannot rely on sub-para. (b) and he becomes a person who has unlawfully landed in this country. It seems to me a corollary that if a requirement is placed on an alien to remain within certain prescribed areas, certain areas must in fact be prescribed, and if the immigration authorities prescribe no area at all in which he may remain, or if they prescribe an area which renders his onward flight impossible, then to my mind they are frustrating the whole purpose of this provision and are acting outside the jurisdiction and discretion which is conferred on them by sub-para. (b) of art. 2 (1). I do not feel impressed as to the dangers to which this interpretation may give rise. The immigration authorities are armed with ample powers. If they feel it dangerous to allow either the plaintiff or any other alien to move from the northern section of the airport to the central section, they can refuse him leave to land. Further than that, I am inclined to the view that, as they are entitled to approve the premises or limits, it would be quite open to them to say that the alien must travel from the northern buildings to the central buildings in a motor car pro-

vided by them or provided by the aircraft company in which either an immigration official or a policeman is also travelling. Be that as it may, if any danger is apprehended the remedy is the refusal of leave to land. Here the immigration authorities did not refuse leave to land, and in those circumstances I think that their purported detention of the plaintiff under the terms of art. 2 (1) (b) of the Order of 1953—namely, by confining the approved area to the northern building—was outside their powers and was illegal.

The question therefore arises whether or not the plaintiff can maintain an action for wrongful imprisonment. As I have already indicated, if the immigration authorities were entitled to confine the approved area to the narrow limits to which they did in fact confine it, then of course the plaintiff could not say that he had been wrongfully imprisoned. If, however, they were not entitled to so confine the permitted area as to prevent him from obtaining access to the aeroplane for the purpose of catching which he had landed at the airfield, then I think that he is entitled to regard that as an unlawful imprisonment. His liberty was restricted to a greater degree than the immigration authorities were entitled to restrict it under art. 2 (1) (b). The fact that they might have restricted his liberty by employing the powers conferred on them by other articles of the Order of 1953 seems to me to be immaterial. It is no answer, when a man says: "I have been unlawfully arrested without a warrant", to reply: "Well, had I, the person making the arrest, taken the trouble to go and get a warrant, I would undoubtedly have got it". That would be no answer to a claim for unlawful arrest. Similarly here, although Mr. Malcolm and his colleagues could have detained the plaintiff by refusing him leave to land, that does not entitle them to detain him on the grounds on which they did.

I have indicated that no express powers of detention are conferred under art. 2 (1) (b). Counsel for the plaintiff has rightly conceded that immigration officials would be entitled to a reasonable time in which to satisfy themselves that the alien who arrived at the approved port really did intend to embark in an aircraft at the same port. If the immigration authorities' inquiries had been confined to that question and they had been completed within a reasonable time, the plaintiff would have raised no complaint: certainly counsel disclaims any suggestion that he would raise any complaint on the plaintiff's behalf. Similarly, I think, without deciding the point, that they would be entitled to a reasonable time to consider whether or not to refuse the alien leave to land. Here that point does not appear ever to have been considered at all, and if it were considered it would not give rise to the type of inquiry which formed the subject-matter of the various telephone messages and conversations which took place between shortly after 6 and approximately 8.30 on the night of Apr. 27. Whatever view one takes of this case, on the interpretation of the law which I now adopt, I cannot see that this delay of nearly two-and-a-half hours could possibly be regarded as reasonable. If I am wrong as to my view of the law, then of course no question as to reasonable time arises, because the plaintiff has never been unlawfully detained. On the law as I understand it, therefore, the plaintiff is entitled to recover damages.

The plaintiff does not ask for an extravagant figure, but, on the other hand, it would be quite wrong for the court to award a contemptuous figure. No pecuniary damage has been suffered, but the very precious right of liberty, which is a right available to everyone who can for the time being be regarded as a

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subject by local allegiance of Her Majesty, is one which must be protected. Doing the best I can, I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be a sum of £150. I need hardly say that I should have felt fully entitled to increase that amount to a very great extent if there had been any suggestion here that the plaintiff was being ill-treated by any of the officials concerned. I am quite satisfied that all the officials genuinely considered that they were doing the best possible thing in difficult circumstances, and in my judgment no blame of any kind rests on them. As I have found, they were called on to decide a very difficult point which I have dealt with, whether rightly or wrongly, with the assistance that has been given to me by the learned Solicitor-General and Mr. Rodger Winn, Mr. Scarman and Mr. Forbes, over a period, as I say, of some two-and-a-half days. In these circumstances, there must be judgment for the plaintiff for £150.

Judgment for the plaintiff.

Solicitors: *Chalton Hubbard & Co., for Marsh & Ferriman, Worthing; Treasury Solicitor.*

G.A.K.

QUEEN'S BENCH DIVISION

(SALMON, J.)

January 30, 31, 1958

BATTELLEY v. FINSBURY BOROUGH COUNCIL

Local Authority—Employment of staff—Appointment by committee—Power of council to delegate functions to committee.

By the London Government Act, 1939, s. 59 (1), a local authority might appoint committees to deal with any purpose which the authority considered would be better regulated and managed by means of a committee, and by s. 67 (1) the authority might delegate such functions as they thought fit to committees. By the defendants' standing orders dealing with the works committee, that committee was to "be responsible for . . . appointment and management of staff of borough engineer's department . . .", and in other standing orders other committees were made responsible for various functions of the defendants. On June 12, 1957, the works committee, purporting to act on behalf of the defendants, entered into a contract with the plaintiff to employ him in the borough engineer's department as assistant road superintendent. The defendants contended that the works committee had no power to enter into such a contract because the appointment of staff to the borough engineer's department had not been expressly delegated to the committee.

HELD: the standing order conferred power on the works committee to appoint staff to the borough engineer's department, and their power was not subject to confirmation by the defendants; therefore, the defendants were not entitled to repudiate the contract made by the works committee with the plaintiff.

ACTION for damages for breach of contract by Arthur Linstead Battelley against the defendants, the Finsbury Borough Council, and for a declaration that his appointment as assistant road superintendent by the defendants, their servants or agents on June 12, 1957, was a valid appointment. The plaintiff, who had been in the defendants' employ for nearly twenty years, except for war service, applied, in answer to an advertisement, for the post of assistant road superintendent with the defendants. On June 12, 1957, he was interviewed by the works committee of the defendants, and the minute of that meeting of the works committee read as follows:—"Appointment of assistant road superintendent . . . Resolved—that [the plaintiff] . . . be appointed assistant road

superintendent on the permanent staff of the borough engineer and surveyor's department at a salary in accordance with Grade A.P.T. II of the national scales commencing at £609 17s. 6d. per annum plus London weighting, and in accordance with the terms and conditions of the National Joint Council Scheme of Conditions of Service and the conditions attaching generally to appointments on the [defendants'] permanent non-manual staff". By a letter dated June 13, 1957, the defendants' town clerk wrote to the plaintiff that "subject to confirmation" he had been selected for the appointment. In July, 1957, the defendants' works committee appointed someone else to the post. At the hearing of the action, SALMON, J., found that there were two points for decision: (i) Did the works committee purport to enter into a contract with the plaintiff on June 12, 1957? and (ii) if they did so, had they authority from the defendants to do so? On the first point, HIS LORDSHIP found that, on June 12, 1957, the works committee, purporting to act on behalf of the defendants, did enter into a contract to employ the plaintiff as assistant road superintendent at a salary of £609 17s. 6d. per annum plus London weighting. The second point is the subject of this report.

Marshall, Q.C., and *R. G. Freeman* for the plaintiff.

Squibb, Q.C., and *Roots* for the defendants.

SALMON, J.: The next point to consider is whether this works committee had the power or the authority to enter into this contract on behalf of the defendants. It appears from a letter written by the town clerk that the members of the council had always supposed that any contract of employment entered into by a committee was not effective until it was confirmed by the council and that the committee had no power to engage staff. I am bound to say that I regard the statement in the letter with some scepticism. The two councillors who were called before me, who are councillors of considerable experience, quite clearly took the view that they had power to appoint, and they are the only councillors who have given evidence in this case. I am very doubtful whether, until this case arose, anyone entertained any serious doubt as to the powers of the committees. However, whether the committee had power or not does not depend on what the councillors, or the town clerk, or anyone else thought about it; it is a pure point of law which can depend only on the true construction of the standing orders and the Act of Parliament under which they were passed.

I ought briefly to notice the two relevant sections of the Act of Parliament. The first is s. 59 (1) of the London Government Act, 1939, and the material part of that reads as follows:

"A local authority may appoint a committee for any such general or special purpose as in the opinion of the authority would be better regulated and managed by means of a committee."

Then there are various provisions in relation to the number of members of the committee and so on, which I need not read. It has been argued on behalf of the plaintiff that, if the local authority does appoint a committee under the subsection which I have read, that committee has power and authority to act on behalf of the council for the purposes for which it was appointed. For example, if a garden committee is appointed, it is suggested that, by their very appointment under that section, they would have power to do whatever might be necessary in relation to the council's gardens on behalf of the council. I do not accept that argument. In my judgment, this section merely gives power to appoint a committee. Once the committee has been appointed, s. 67 (1) of the Act deals with what powers may be delegated to the committee, and that subsection reads as follows:

"A local authority may, with or without restrictions or conditions, as it thinks fit, delegate to a committee appointed by the authority, whether under this Part of this Act or under any other enactment, any functions relating to a matter which under or in pursuance of any enactment, including any enactment in this Act, stands referred or is referred to that committee."

It is clear that there was a works committee appointed by the defendants under s. 59 of the Act. The question is: Did the defendants delegate to that committee the power to appoint, amongst other things, an assistant road superintendent? For that purpose, one must look at the standing orders, and the standing order dealing with the works committee, in so far as it is material, reads as follows:

"The works committee shall be responsible for . . . 9. Appointment and management of staff of borough engineer's department (except cleansing section)."

I should say that the assistant road superintendent is a member of the staff of the borough engineer's department, and he is not in the cleansing section. To my mind, the words which I have read, in their ordinary natural meaning, without any doubt confer on this committee authority to appoint staff of the borough engineer's department, and that is not subject to confirmation or anything else. The appointment of the staff is a matter for which they are made responsible under the terms of that standing order.

It has been suggested on behalf of the defendants that, although that may be the meaning of those words, if they were the only words, yet, if one looks at the end of the standing order dealing with the works committee, the language which is used should drive a court to the conclusion that the words to which I have referred do not mean what they would normally mean. The language on which counsel for the defendants relies is as follows:

"There is delegated to the works committee (subject to report to the [defendants] as soon as practicable after the exercise thereof) functions of the [defendants] in respect of matters arising under the London Building Acts"

and so on. What he says is that, if one looks at the dichotomy of this standing order, it appears that, when the defendants desire to delegate, they use the word "delegate", and, accordingly, when they do not use the word "delegate" it must be taken that they do not intend to delegate. I reject that argument.

I have looked through the whole of these standing orders, and I find in them certain matters which tend, in my view, to support the ordinary normal meaning of the crucial words. The first standing order dealing with committees is a general reference to all committees. It is to be observed that most of the committees which are dealt with thereafter are given the responsibility of appointment and management of staff. At the end of the general reference to all committees there are these words:

"As regards non-manual staff, no appointment, whether original or replacement, shall be made to the unestablished staff except with the prior consent of the [defendants] upon the recommendation of the staff committee."

That suggests that, when something other than non-manual staff is being dealt with as part of the unestablished staff, the committees who have power to appoint have power to appoint, and there is no question of their getting prior consent of the defendants or recommendation of the staff committee or anything else.

Although it is not conclusive, that language seems to me strongly to suggest that the only limit on the power of appointment which is subsequently conferred by the standing orders is the limit which is fixed by those words. It would, indeed, be strange if the argument adduced on behalf of the defendants is right, for I observe that, under "establishments committee", for example, the establishments committee shall be responsible for the appointment, amongst other things, of telephonists and cleaners. If the defendants are right, every time a cleaner is appointed, that appointment is subject to confirmation by the defendants in general session, a strange result.

Looking through the rest of these standing orders I pick out at random the health committee. The health committee are to be responsible among other things for

"The functions of the [defendants] and its officers under all enactments relating to the manufacture, preparation, storage, exposure for sale, marking or designation of food and drugs for human consumption; and the registration, licensing and control of premises concerned therewith."

What they are responsible for there is the functions of the defendants, and there are many other of these standing orders similarly worded. Surely, if the defendants make a committee responsible for their functions, they are delegating by those words those functions to that committee? I observe that, as far as the health committee is concerned, the standing order finished with the words:

"There is delegated to the health committee, subject to report being made to the [defendants] as soon as practicable after the exercise thereof, the functions of the [defendants]"

in relation to certain other matters. If counsel for the defendants is right in his argument, then the only delegation by the defendants is a delegation when the word "delegation" is used, but when they merely say that the committee are responsible for their functions that is not a delegation because they do not use that word. To my mind, there is no such magic in the word "delegation". The fact that it is used in parts of these standing orders and not in others is attributable, to my mind, not to the fact that it means something different but to the fact that these standing orders are, perhaps, not a miracle of felicitous draftsmanship. I am told, however, that these standing orders are in fairly common form and are used by many councils and that this point is one of some general importance. There is, however, no authority on this point and I am left merely to construe the standing orders which I construe in the way I have indicated. It is strange that there is no authority on the point. It means either that no committee has so far exceeded its authority, or that no public body has, up to this moment, thought it consistent with its dignity in the ordinary course of decent conduct to repudiate the action that has been taken on its behalf by a committee of its own councillors. However that may be, I have no hesitation on the plain construction of these standing orders in rejecting the contention put forward on behalf of the defendants that the works committee had no authority to enter into the agreement which I find they did enter into on June 12, 1957. [His LORDSHIP considered the question of damages, and awarded the plaintiff £30.]

Judgment for the plaintiff.

Solicitors: *Parsons* (for the plaintiff); *Town Clerk, Finsbury Borough Council* (for the defendants).

G.A.K.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND COLLINGWOOD, J.)

January 15, 16, 31, 1958

COX v. COX

Husband and Wife—Desertion—Defence—Reasonable belief in deserted spouse's adultery—Belief induced by conduct.

The parties were married in 1954 and the wife continued to be in employment during the marriage. In May, 1957, the husband overheard a conversation between the wife and his sister in which the wife stated, in effect, that a man at her place of employment had shown affection for her and that, while waiting at the canteen for the works truck to take her and the other employees home, she had embraced him to an extent which produced sexual excitement, and that their conduct had led to jests by fellow employees. After hearing this conversation, the husband withdrew from cohabitation. On a complaint by the wife that he had deserted her the husband alleged that he honestly and reasonably believed that she had committed adultery. The justices accepted his evidence and dismissed the complaint.

HELD: the husband was guilty of desertion since, as he had no evidence of opportunity for his wife to commit adultery, his belief in her adultery was not founded on reasonable grounds.

APPEAL by the wife against an order of the Tisbury and Mere justices, dismissing her complaints against the husband of desertion, persistent cruelty and wilful neglect to provide reasonable maintenance for herself and the child.

J. F. E. Stephenson for the wife.

Tolstoy for the husband.

Cur. adv. vult.

Jan. 31. **COLLINGWOOD, J.**, read the judgment of the court: This is a wife's appeal from a decision of the justices for the petty sessional division of Tisbury and Mere, sitting at Tisbury, whereby they, on Oct. 7, 1957, dismissed her complaints that her husband had (i) deserted her on June 22, 1957; (ii) been guilty of persistent cruelty to her, and (iii) been guilty of wilful neglect to provide reasonable maintenance for her and the infant child of the marriage. At the same hearing, a summons by the husband for the custody of the child under the Guardianship of Infants Acts, 1886 and 1925, was adjourned, and this was dealt with on Oct. 17, 1957, together with a cross-summons for custody by the wife under the same Acts and an order was made in her favour for 30s. weekly for the child's maintenance. The present appeal relates only to the dismissal of the complaints of desertion and wilful neglect to maintain. There is no appeal from that part of the decision relating to the charge of persistent cruelty.

As to the desertion, the wife alleged that the husband had withdrawn from cohabitation, though the parties remained under the same roof, and the case was conducted before the justices, and before this court, on the assumption that the circumstances in which the parties were living as from June 22, 1957, amounted to desertion by the husband, unless he could satisfy the court that he had a bona fide and reasonable belief, induced by her conduct, that his wife had committed adultery. It is unfortunate that no notice of the nature of the case against the wife was given prior to the hearing before the justices. That such notice should be given has been pointed out in a number of cases, including *Sullivan v. Sullivan* (1). Here the first intimation of the line of defence appeared in the cross-examination of the wife, and while it is true that the case was not

completed on the first day (Oct. 3), but adjourned part heard until Oct. 7, so that the element of surprise was to that extent diminished, nevertheless the case was not opened or presented on the wife's behalf as it would have been had such notice been given, and one of the grounds of appeal as originally drawn arose out of this, though the matter was not pressed before this court.

The justices found that the husband had proved that he had a bona fide belief that his wife had committed adultery, that he had withdrawn from cohabitation because of that belief, and that he had reasonable grounds for so believing. The grounds of appeal are that these findings are against the weight of the evidence. The facts, so far as it is necessary to state them for the present purpose, are as follows. The parties were married on Feb. 27, 1954, the wife being then eighteen years old, the husband twenty-four. There is one child, Stephen, born on June 6, 1956. After the marriage they lived with his parents for a few weeks, after which they obtained a house at Zeals in Wiltshire. The wife was in employment at the time of the marriage, and continued to work after it. The husband is employed as a lorry driver. It is common ground that the marriage was unhappy from shortly after its beginning. The wife complained that her husband consistently neglected her, adopted a domineering attitude towards her, continually complained of her deficiencies as a housewife, though giving her little or no assistance, frequently abused and threatened her, and on occasions assaulted her. The husband agreed that he did complain, and said that he had good cause for so doing, alleging that she did not look after the house, but allowed it to get into a filthy condition; did not look after him, as regards his meals or mending, and neglected the child in regard to his feeding, care and general supervision. He said in evidence that she was no good as a wife or a mother, and admitted having struck her twice, and further that he had told her many times that he had no love for her, and that she got on his nerves. Shortly after the birth of the child, in June, 1956, the husband's sister, Mrs. Oliver, came to live with them, bringing with her two children of her own, and a coloured boy to whom she was acting as foster-parent with a view to adopting him. Mrs. Oliver remained with them until July 19, 1957, and while she was there she did the bulk of the housework, and looked after the child Stephen while the wife was away at work, which was from about 6.30 a.m. to 6.30 p.m. during the week.

In May, 1957, the husband ceased to have intercourse with his wife, moving into a separate room. He did so, he says, because of certain statements which he overheard his wife make to Mrs. Oliver. There were two conversations involved, the first taking place in December, 1956, when he says he heard his wife speak of a fellow-employee, one Hall, saying that he was very handsome, and that he had said that he wished that he and she (the wife) could spend more time alone, and that he was in love with her. The wife added that she thought that he really meant it. The husband said he did not think much about this conversation, though later, in cross-examination, he said he was "suspicious". He said that it was the second conversation which made him cease to sleep with his wife. This was in May, 1957, when he heard her tell his sister that her workmates waiting in the queue for the truck, used to convey them from the works where she and Hall were employed, had said to her "Come on Joyce, we've got homes to go to, even if you haven't". She added that she had been kissing and cuddling Hall in the adjoining canteen, and had made Hall "conscious of himself", and that the other drivers had said to Hall "put a coat over it, Stan", a remark which she had subsequently repeated (she said) as a joke. Mrs. Oliver did not discriminate between the two conversations. Her version was that the wife told her that she and Stan Hall had got to the stage of kissing

and cuddling in the canteen or shed; that Hall loved her; that he used to hang back (that is, delay his departure) so that she could kiss him, and that she had made him conscious that he was a man, and that his mates had told him to put a coat over himself.

The wife in cross-examination agreed that she had mentioned Hall to Mrs. Oliver, but denied having said that Hall loved her, or that she had been kissing and cuddling in the canteen. Some two days after hearing this conversation the husband spoke to the wife about it, and he says that her reply was that Hall was just a driver at the works—there was nothing in it—they were all as bad as one another, and it was not true. He says that she then added "a slice off a cut loaf is never missed", a remark which the wife agreed she had made, but said it was at another time, and not in connexion with Hall. The husband then said to his wife "You have been having dealings with this man Hall", to which she replied that Hall was a decent man and devoted to his wife and daughter. The husband consulted a solicitor, and thereafter, he says, he acted on the solicitor's advice.

The principle invoked by the husband in this case is that laid down in *Glenister v. Glenister* (1), in which case LORD MERRIMAN, P., said:

"If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

This decision has been followed frequently in this court and the principle has been approved by the Court of Appeal in *Allen v. Allen* (2) which was itself explained in *West v. West* (3).

The first question which arises is: Does the evidence support the justices' finding of fact that the husband withdrew from cohabitation because he honestly believed that his wife had committed adultery? The husband said in evidence "I thought she was having intercourse with Hall", and that he ceased to have intercourse with his wife because of the conversation which he overheard in May, 1957, and the justices accepted his evidence. It was urged on behalf of the appellant wife that on his own admission the husband had lost all interest in and affection for his wife long before May, 1957; that he regarded her as no good as a wife or a mother, and that what he did was to seize with avidity on an excuse to be rid of her. Be that as it may, we do not think that we can say there was no evidence to justify the finding of the justices on this point. The circumstances referred to, however, as to the husband's state of mind, are not without relevance to the second question, viz.: was his belief that of a reasonable man, and was it based on reasonable grounds?

His belief was founded, and founded solely, on what he had heard his wife say to his sister, together with his wife's subsequent conversation with him. The wife's statement to her sister-in-law amounts to this: that the man Hall had evinced an affection for her; that she was gratified by his attentions, and had indulged in kissing and embracing with him, to an extent which had avowedly produced sexual excitement. This had taken place in the daytime, in the canteen at the works where both were employed, at a time when, with others, they were waiting for the truck, and in circumstances in which their conduct was obvious to a number of fellow-employees, who had been moved to ribald

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) 115 J.P. 229; [1951] 1 All E.R. 724.

(3) [1954] 2 All E.R. 505; [1954] P. 444.

jest. There was no evidence of any association between the two at any other time or place. In our opinion the circumstances above described preclude the commission of adultery there and then. We were invited to hold that the wife's behaviour, as disclosed in her conversation with her sister-in-law, showed that she had an inclination to commit adultery, and that her hours of absence from home of necessity afforded an opportunity of indulging that inclination. But assuming, as we are prepared to assume, that what the wife said did amount to evidence of inclination to commit adultery, as distinct from a mere willingness to indulge in amorous dalliance falling short of adultery, we do not think that the necessary element of opportunity to indulge the inclination can be left to be inferred in the absence of any evidence to support it.

In our opinion the evidence in the husband's possession as to his wife's conduct was not such as to afford reasonable grounds for believing that she had committed adultery. He was disposed to put the worst construction on anything she said or did, but the test of reasonableness is an objective one. We were invited by counsel for the husband to say that if the evidence did not disclose reasonable grounds for believing that the wife had committed adultery then nevertheless her conduct was in itself such a grave and weighty matter as to justify the husband in leaving her, and in support of this contention we were referred to *Haswell v. Haswell & Sanderson* (1). This was a petition by a husband by reason of his wife's adultery. The marriage had taken place without the knowledge of the parents of either party, and the wife continued to live with her mother, where the husband visited her from time to time. On one such visit he discovered his wife in a room upstairs with a man who had his arm round her and his hand on her breast. After consideration he decided to have nothing more to do with his wife and never again visited her mother's house.

Subsequently the wife cohabited with another man, and there was no doubt as to her adultery with him. The decision turned on the construction of s. 31 of the Matrimonial Causes Act, 1857, which provided (omitting words which have no relevance to the case):

"... the court shall not be bound to pronounce such decree . . . if the petitioner shall, in the opinion of the court, have been guilty of . . . having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without any reasonable excuse."

The court held that the husband having found his wife submitting to indecent liberties had on that ground never returned to her mother's house where she resided. The Judge Ordinary (SIR CRESSWELL CRESSWELL) continued:

"It is not necessary for the court to say that this would have justified him in turning her out of his house; that it would have enabled him to resist an action of debt for necessities supplied her; or would have been a sufficient answer in a suit for restitution of conjugal rights. But the question is, whether we are in a position to exercise a discretionary power. The adultery has been fully proved, and we cannot say that the petitioner comes within the description of a person 'wilfully separating himself without reasonable excuse'. The discretionary power therefore does not exist. The petitioner is entitled to a decree."

With regard to this decision it is to be noted that the Judge Ordinary expressly refrained from deciding whether the wife's conduct was such as to justify the husband in turning her out, or would have afforded an answer to a suit for restitution. Further, the circumstances differ considerably from those in the

(1) (1859), 23 J.P. 825; 1 Sw. & Tr. 502.

present case. In *Haswell v. Haswell* (1) the wife was found in the home indulging in an act of sexual familiarity.

However that may be, we are not considering whether or not the facts in *Haswell v. Haswell* (1) would bring the case within the principle laid down in *Glenister v. Glenister* (2). We think that, because of the nature of the offence of adultery, the principle of that case should not be extended beyond its proper scope. For example, it would be going further than is warranted by the reasoning on which the decision in *Glenister v. Glenister* (2) is based to hold that a husband would be justified in leaving his wife on the belief that she had been cruel to him; or that she had given him some other ground of complaint which he reasonably believed would afford him the right to leave her. It is sufficient to say that we do not think that it would be right in this case, despite the wide terms of the Matrimonial Causes Rules, 1957, r. 73 (7), to decide the case on an entirely new issue which was never adumbrated in the court below, and which involves a finding of fact as to which no evidence was given. The husband's case from first to last was that he left his wife because he believed that she had committed adultery. In our opinion that was not a reasonable belief, and we do not think we ought now to enter into a consideration of the further question whether he would have been justified in leaving her, without his having drawn the unjustifiable inference to which he himself ascribes the separation. The appeal is therefore allowed.

LORD MERRIMAN, P.: The result is that the appeal is allowed, the wife's complaint of desertion will be held to be proved, and the case remitted to the magistrates to assess the amount of maintenance, if any, as from Oct. 7, 1957.

Appeal allowed.

Solicitors: *Butt & Bowyer*, for *Rutter & Rutter*, Wincanton; *Markham Thorp & Co.*, for *Farnfield & Nicholls*, Gillingham, Dorset.

G.F.L.B.

- (1) (1859), 23 J.P. 825; 1 Sw. & Tr. 502.
(2) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY, CASSELS, BARRY AND SALMON, JJ.)

January 27, 28, February 3, 1958

R. v. GREEN

Criminal Law—Sentence—Alleged breach of probation order—Right of Court of Criminal Appeal to inquire whether breach proved—Offence during period of probation—Illegal sentence passed—Offender released, but conviction not quashed—Power to sentence for original offence—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 6 (4) (b), (6), s. 8 (5).

Where an offender who has been placed on probation is brought back to a court of assize or quarter sessions to receive sentence for the original offence in view of an alleged breach of the terms of the probation order and is sentenced by the court on that basis, and then appeals to the Court of Criminal Appeal against the sentence, the Court of Criminal Appeal has the right to consider whether the breach was properly proved at the court of assize or quarter sessions as well as to review the quantum of the sentence.

In January, 1957, the appellant was convicted at quarter sessions of shopbreaking and larceny and was placed on probation for two years. In October, 1957, he was convicted at a magistrates' court of larceny and was sentenced to two months in a detention centre. As that sentence was less than the statutory minimum of detention, namely, three months, he was released by order of the Home Secretary after eight days, but the conviction of the magistrates' court was not quashed. In November, 1957, he was brought back to quarter sessions to receive sentence for the original offence, and the court, taking the view that he had failed to comply with a requirement of the probation order and purporting to act under s. 6 (4) (b) of the Criminal Justice Act, 1948, sentenced the appellant to Borstal training. On appeal against sentence,

HELD: (i) that the Court of Criminal Appeal had power to consider on the appeal whether failure to comply with a requirement of the probation order had been properly proved at quarter sessions; (ii) that, if there had been an application to the High Court by way of certiorari, the conviction as well as the sentence at the magistrates' court would have been quashed, and, therefore, that conviction could not be relied on by quarter sessions to show failure to comply with a requirement of the probation order; (iii) that, in any event, s. 6 (4) (b) of the Act of 1948 could not be made use of by quarter sessions by reason of sub-s. (6); and, therefore, the sentence of Borstal training must be quashed.

QUAERE, whether where a magistrates' court had convicted an offender, but imposed an invalid sentence, the offender had been "convicted and dealt with" within the meaning of s. 8 (5) of the Criminal Justice Act, 1948.

APPEAL against sentence.

On Jan. 27, 1957, the appellant, Noel Green, pleaded Guilty before quarter sessions for the county of Buckingham to shopbreaking and larceny and was placed on probation for two years. On Oct. 14, 1957, he pleaded Guilty at a magistrates' court at Aldershot to stealing a bicycle and was sentenced to two months' detention in a detention centre. This sentence was below the statutory minimum of three months' detention, applicable in the circumstances of his case, and the Home Secretary ordered the appellant's release on Oct. 23, 1957. The appellant was brought before the Buckingham Quarter Sessions again in respect of the breach of his probation order, and, on Nov. 11, 1957, he was sentenced to Borstal training for the original offence. He was nineteen years of age. Quarter sessions purported to act under s. 6 (4) (b) of the Criminal Justice Act, 1948. The appellant admitted before quarter sessions the theft of the bicycle, and that he understood that this was a breach of the probation order. The appellant appealed against this sentence on the ground that, the sentence of Oct. 14, 1957, being bad, the conviction could not be used as constituting a breach of the probation order.

At the original hearing of his appeal on Jan. 27, 1958, before **HILBERY, JONES** and **SALMON, JJ.**, counsel for the appellant admitted there could be no appeal against the conviction on Jan. 27, 1957, and limited his appeal to one against sentence only on the ground that it had not been properly proved that there had been a breach of the probation order. The Crown raised the point that the Court of Criminal Appeal had no jurisdiction, when hearing an appeal against sentence, to consider whether it had been validly proved that the probationer was in breach of the probation order, but only to consider the quantum of sentence. This point was adjourned for hearing by a court of five judges.

D. R. M. Henry for the appellant.

J. Malcolm Milne for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court: The appellant was originally convicted of shopbreaking and larceny before quarter sessions at Aylesbury and was placed on probation. While he was on probation he committed another offence of stealing a bicycle, for which he was brought before a magistrates' court at Aldershot. The magistrates' court, thinking, I

suppose, that they did not want to be too hard on him, and thinking that a detention centre was the place to send him, sent him to a detention centre for two months. Unfortunately a court cannot send a person to a detention centre for less than three months. I suppose Parliament thought, and one can well understand it, that if a boy is to get any real advantage from detention in a detention centre three months is the least time for which he should be treated. No doubt when this matter was brought to the attention of the Home Office, the Home Secretary came to the conclusion that it was his duty to order the appellant to be released because he took the view that he was being held under an illegal sentence. The Home Secretary did not purport to quash the conviction because the Home Secretary has no power to quash a conviction; he can only act under the prerogative, and the conviction never has been quashed. In this case the appellant was released. Thereupon, he was brought before quarter sessions at Aylesbury, and the court had considerable difficulty in knowing how to deal with him because the sentence which had been passed for stealing the bicycle was an illegal sentence for the reason which I have mentioned. The court came to the conclusion that they would deal with him under s. 6 of the Criminal Justice Act, 1948. That is a section which enables the court to deal with a breach of conditions which may be imposed on a person who is put on probation. One of the terms of the probation very often is that the probationer shall live at a certain place or that he shall live where directed by the probation officer. Sometimes a term is put on him that he shall not live at a certain place; there are various other terms which the court can place on a probationer and, of course, there is always the condition that he shall keep the peace. Sometimes a condition is inserted that he shall lead an industrious life, so that if he is offered work and will not take it he may be brought before the court for breach of probation. Apparently s. 6 of the Criminal Justice Act, 1948, is meant to deal only with breaches of that description because the concluding words of sub-s. (6) of that section are:

"... and without prejudice to the provisions of s. 8 of this Act, a probationer who is convicted of an offence committed during the probation period shall not on that account be liable to be dealt with under this section for failing to comply with any requirement of the probation order."

For the purposes of s. 6, therefore, a further offence is, so to speak, out.

Counsel for the appellant has quite rightly called attention to the fact that a certain procedure is laid down for the court to deal with a probationer under s. 6. He has to be brought before a court of summary jurisdiction. Then, if the probation order was made by a court of assize or quarter sessions he has to be committed to custody or released on bail until he can be brought or appear before the court of assize or quarter sessions. When he is brought before the court of assize or quarter sessions, then, under s. 6 (4) (b) of the Act of 1948, if—

"... it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

The first point that we have to deal with, before turning to s. 8 of the Criminal Justice Act, 1948, is this. Counsel for the Crown has addressed an interesting argument to the court whether there is any right to appeal here at all because he says there has been no conviction against which an appeal will lie, and the only possible appeal would be against the quantum of sentence when one is

dealing with an appeal against sentence. It appears, however, from the cases which he has most properly brought to our attention that from a very early period of the history of this court the court have always dealt with the question whether a person brought before a court because of a breach of recognisance has a right of appeal, and he has always been granted a right of appeal. A case in which the doubt was set at rest is *R. v. Smith* (1). Since that case it has been quite clear that where a person is brought before the court under the terms of a probation order or a common law recognisance and is subsequently sentenced this court always has power to deal with the question whether the breach of probation or recognisance has been properly proved. We think, therefore, that we should not be following the cases which have been decided if we held that there was no such right of appeal.

Then what are we to do? We have said that s. 6 of the Criminal Justice Act, 1948, under which quarter sessions purported to act in this case did not apply. We do not think the attention of quarter sessions could have been called to the concluding words of sub-s. (6). Quarter sessions did consider s. 8, and the difficulty which they felt with regard to s. 8 is a very real difficulty. It is the difficulty of using a conviction which is recognised to be bad so far as the sentence passed on that conviction is concerned to establish a ground for saying that a person had committed a breach of recognisance. The matter is put quite shortly, as a matter of fact, in the appellant's notice of appeal, when he says:

"In September, 1957, I was charged with the stealing of a cycle and sent to a detention centre for two months by the Aldershot magistrate. It was later found that the minimum sentence was three months and the offence was quashed and I was discharged after serving only eight days. If this offence was quashed I fail to see how I could be charged with breach of probation for which I have received borstal training."

In other words he is saying that the conviction at the magistrates' court cannot be used to prove that he had committed a breach of probation. The conviction never was quashed in fact, but it is quite clear that if the appellant could have been advised at the time, he would have been advised to apply for an order of certiorari to the Divisional Court to bring up that conviction before the Aldershot magistrates and get it quashed, and quashed it would have been. It is an unfortunate hiatus in our law, and one to which the Queen's Bench Division has on more than one occasion called attention, that unfortunately the High Court have no power to amend where a conviction by magistrates is brought before the court and where the magistrates per incuriam have passed a sentence which is not justified by law as, for instance, where they impose a fine of £10 in what they regard as a very bad case, but the statute only allows a fine of £5 to be ordered. The High Court can only look at the conviction, and the conviction is bad on its face, and therefore has to be set aside. It is quite absurd because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an illegal sentence is passed, this court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of certiorari that the Queen's Bench Division has no power to put it right, and I hope that at no great distance of time a provision will be made in the law, though it must be made by an Act of Parliament, to give the Queen's Bench power to alter an illegal sentence which is passed to a legal sentence, because otherwise the offender goes unpunished.

(1) 89 J.P. 79; [1925] 1 K.B. 603.

The one thing which has given us trouble in this case is that sub-s. (5) of s. 8 provides:

"Where it is proved to the satisfaction of the court by which a probation order or an order for conditional discharge was made, or, if the order (being a probation order) was made by a court of summary jurisdiction, to the satisfaction of that court or the supervising court, that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, or during the period of conditional discharge, as the case may be, the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence."

Those words "convicted and dealt with" cause some difficulty. It may be that on their true construction the words simply mean that the magistrates have made some order, so that they are functi officio; or the words may mean convicted and sentenced, and therefore dealt with. The court do not propose in this case to resolve that difficulty, which really is more or less academic. What we do feel is that in this case we ought not to allow the present sentence to stand as a sentence following on the breach of a probation order, since the sentence that was passed by the magistrates at Aldershot could not be upheld, it being for only two months instead of three months (for which reason the Home Secretary felt obliged to discharge the boy from custody) and since, if the case had then been brought before the Divisional Court by certiorari, the conviction would have been quashed. If the conviction had been quashed, it could not have been used to support a breach of probation. The case is unsatisfactory, the application is wholly technical, and there are no merits in it at all, as counsel for the appellant, who has quite properly taken every point, has admitted; but the criminal law still allows technical points to be taken, and, if the technical point succeeds, the offender goes unpunished. In this case it may be unfortunate that the appellant who is obviously in need of discipline and training will have to be discharged, but this court cannot see any way in which this order can properly be upheld, and the appeal is, therefore, allowed and the appellant will be discharged.

Sentence quashed.

Solicitors: *Registrar of Court of Criminal Appeal; N. M. Fowler, High Wycombe.*

T.R.F.B.

COURT OF APPEAL

(LORD DENNING, HODSON AND MORRIS, L.JJ.)

December 9, 10, 11, 12, 1957, February 7, 1958

PYX GRANITE CO., LTD. v. MINISTRY OF HOUSING AND LOCAL
GOVERNMENT AND ANOTHER

Town and Country Planning—Permission for development—Refusal—“Development authorized by local or private Act”—Agreement between quarry-owners and local authority as to areas to be quarried—Agreement “confirmed and made binding” by local and private Act—Permission granted subject to conditions—Conditions as to land not included in application for permission—Validity—Action for declaration as to validity of refusal and conditions—Jurisdiction of High Court—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 14 (2), s. 17 (1).

In 1924 a quarrying company owned certain freehold lands and had quarrying rights on other land in the Malvern Hills. During the passage through Parliament of the Bill for the preservation of the Malvern Hills, which ultimately became the Malvern Hills Act, 1924, negotiations took place between the company and the promoters of the Bill, the Malvern Conservators and the Malvern U.D.C., which resulted in an agreement between the parties that the company should continue to quarry on its freehold land, should abandon its quarrying rights in a certain area of other land, should retain its quarrying rights in part of other land known as the N. area, and should have transferred to it additional rights in other parts of the N. area. The terms of this agreement were embodied in heads of agreement which were drawn up, but not executed, before the Bill became law, and were set out in sch. 4 to the Act. The Act provided, by s. 54, that “for the protection of the company, the following provisions shall, unless otherwise agreed in writing between the company and the conservators and the Malvern council, have effect (that is to say): the heads of agreement . . . are hereby confirmed and made binding on the company and the conservators and the Malvern council, and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement”. The heads of agreement contemplated the execution of a formal agreement, which was ultimately effected by a deed, made on Dec. 14, 1925, and executed by the company, the conservators and the council, whereby the agreed areas in which the company should quarry were defined. On Nov. 17, 1947, the company applied to the council for planning permission to develop two of the agreed areas of land for quarrying purposes. One of these areas, the T. area, was the freehold property of the company, the other was the N. area. On Jan. 14, 1948, the Minister called in this application for decision by himself. In July, 1952, a public inquiry was held and the company invited the dismissal of their application on the ground that the proposed development was authorised by the Act of 1924 and so was within class 12 of the General Development Orders as being “development authorised by any local or private Act of Parliament . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out”. The Minister, having rejected this submission, on Sept. 30, 1953, refused permission to work parts of the T. area, granted permission to work the remainder of the T. area only on conditions and only until June 30, 1960, and refused permission for any work in the N. area except the minimum required to secure safety from a threatened fall of rock.

The company intended to crush and screen the stone to be quarried from the T. area on some of their other land, which was very near, with plant and machinery which was already installed there. As this plant and machinery had been in use on the same land since before 1947 no planning permission was required for its use or maintenance there, and so no application for any planning permission in respect of this land was made. Nevertheless, the conditions on which the Minister granted permission to work part of the T. area limited the times when the crushing and screening plant and machinery could be used and required its eventual removal.

In December, 1953, the company issued a writ for declarations (a) that it was entitled to carry out the proposed development without obtaining any special planning permission, and (b) that the above conditions as to crushing and screening were invalid in that they applied only to land in respect of which no application to develop had been made. The planning authorities contended, *inter alia* (i) that the court had no jurisdiction because s. 17 of the Act of 1947, by providing for applications to the Minister to determine whether planning permission was required to be obtained for any proposed development, impliedly excluded the right to apply to the court for such a declaration; (ii) that the proposed development was not within class 12; (iii) that the wide discretion to impose conditions conferred by s. 14 of the Act of 1947, and the availability of the alternative remedy of certiorari, each prevented the exercise of that discretion being questioned by proceedings for a declaration.

HELD: (i) the conditions related to "the carrying out of works on" land under the control of the company, and, as the plant and machinery were ancillary to the getting of stone from the permitted quarries, could properly be regarded as expedient "in connexion with" the permitted development, and, therefore, they were within s. 14 (2) and were valid.

(ii) (per LORD DENNING and MORRIS, L.J.), the court had jurisdiction to make the declarations sought because, as to declaration (a), there was nothing in the Act of 1947 which debarred a developer from seeking such a ruling of the High Court; and, as to declaration (b), the remedy applied to administrative acts as well as to judicial acts whenever their validity was challenged because of a denial of justice or for other good reason, and the facts that the conditions imposed would operate as a land charge and that there was no statutory remedy available for the purpose were such good reasons.

(iii) (per LORD DENNING and HODSON, L.J.), the proposed development was authorised, not by the Act of 1924, but by the heads of agreement, and so was not within class 12 and special planning permission was necessary, because, although the heads of agreement amounted to an implied agreement by the conservators and the council authorising the company to quarry stone within the agreed limits, and although the agreement was "confirmed and made binding" by s. 54 of the Act, s. 54, which contemplated the execution of the formal agreement of Dec. 14, 1925, did no more than make the unexecuted heads of agreement as binding as a contract, and so their provisions could not be regarded as equal to a statute, or as carrying the authority of Parliament, but only as of contractual force: *R. v. Midland Ry. Co.* (1887), 10 Q.B.D. 540, applied.

Per LORD DENNING (MORRIS, L.J., concurring): Certiorari was confined to judicial acts, and it could be argued that the Minister, when granting planning permission, was acting, not judicially, but administratively, and that his decision was, therefore, not subject to certiorari. If the Minister had sought to impose like conditions about plant or machinery a mile or so away, it might well be that could only be done by an order under s. 26.

APPEAL by defendants from a decision of LLOYD-JACOB, J.

The defendants, the Ministry of Housing and Local Government and the Worcestershire County Council, planning authorities, appealed against the decision of LLOYD-JACOB, J., declaring (i) that the carrying on of quarrying operations for the winning and making of stone at and in the plaintiff, Pyx Granite Co., Ltd.'s, lands and quarries known as Tank Quarry, Scar Rock Quarry, and North Quarry situate in the urban district of Malvern in the county of Worcester was developed within the meaning of the Town and Country Planning Act, 1947, which was included in class xii of Part 1 of sched. 1 to the Town and Country Planning (General Development) Order, 1948, and permitted unconditionally by art. 3 thereof and thereafter was included in class xii of Part 1 of sched. 1 to the Town and Country Planning General Development Order, 1950, and which was accordingly permitted unconditionally by art. 3 thereof; and (ii) that the decisions of the Minister, dated Sept. 5, 1949, and Sept. 30, 1953, were of no effect in so far as they purported to refuse permission to carry out such quarrying operations, and were of no effect in so far as they purported to grant permission subject to conditions; and that those decisions in no way limited or

took away the company's rights to carry on quarrying operations under and by virtue of the unconditional permission given by art. 3 of the Orders of 1948 and 1950.

Squibb, Q.C., Rodger Winn and Leggatt for the defendants.

Ramsey Willis, Q.C., and Scrivens for the plaintiff company.

Feb. 7. The following judgments were read.

Cour. adv. vult.

LORD DENNING: The Malvern Hills are of great natural beauty. They are also an important source of granite for roads. The Pyx Granite Company have the right to quarry in two areas of the hills. The questions in this case are two: First, whether the company have to obtain the permission of the planning authority before breaking fresh surface; secondly, if permission is necessary, what conditions can the planning authority lawfully impose? The Minister of Housing and Local Government says that the company are not entitled to win and work granite from the Hills except with the special permission of the local planning authority, that is, the Worcestershire County Council, or of the Minister. The Minister is ready to grant permission to the company to quarry to a limited extent, but no more.

There are two quarryable areas concerned. One is the Tank Quarry area. It is the freehold property of the company. It is the most important of the Malvern quarries, and is eleven acres in extent. There are five acres of it not yet touched which contain sufficient stone to last a hundred years. The Minister, by a letter dated Sept. 30, 1953, refused permission to work a tract of this land because he wished to preserve the skyline; and he also refused permission to work a spur of the land because it screened the workings. He has granted permission to work the remainder, but only until June 30, 1966. The other area is the North Quarry area. It is owned by the Malvern council, but they have granted to the company licences to work it until June 24, 1960. It is twenty-three acres in extent, but is in a dangerous state. There is a fault which has threatened to cause a large fall of rock. The Minister, by a letter dated Sept. 5, 1949, has granted to the company permission to win and work the minimum amount of granite required to secure safety, but by the letter of Sept. 30, 1953, he has refused permission for any other working.

The company contend that the Minister's letter refusing permission is of no validity at all. They say that they do not require special permission to work these areas because they were authorised to work them by a local or private Act of Parliament, namely, by the Malvern Hills Act, 1924. They say that development so authorised comes within the General Development Order which makes special permission unnecessary. The Minister has rejected this contention, and the company now bring this action asking the court to declare that they are in the right about it.

Counsel for the Minister takes a preliminary objection. He says that the court has no jurisdiction to entertain this claim for a declaration, and he relies on *Barraclough v. Brown* (1) for the purpose. The only procedure open to the company is, he says, by application under s. 17 (1) of the Town and Country Planning Act, 1947, which says that:

"If any person who proposes to carry out any operations on land... wishes to have it determined... whether an application for permission in respect thereof is required under this Part of this Act having regard to the provisions of the development order, he may... apply to the local planning authority to determine that question."

(1) 62 J.P. 275; [1897] A.C. 615.

Eng. Per.

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It is as well to see what the procedure of s. 17 entails. Take a company which wants to know whether permission is required for its proposed development. The company can apply to the county council to know whether permission is required or not. If the county council decides that permission is required, the company can appeal to the Minister, or the Minister can "call in" the application to be determined by himself in the first instance. If the Minister decides (either on appeal or at first instance) that permission is required, there is no appeal to the courts from his decision at that stage, but his decision is not final. The company can test the correctness of it in a roundabout way. They can ignore his decision, and carry out their operations without permission; and then, when the county council serve an enforcement notice, the company can appeal to a court of summary jurisdiction and ask for the notice to be quashed on the ground that no permission was required—see s. 23 (4) (a)—and thence, by applying for a case to be stated, the company can obtain the ruling of the High Court. See what this means. The company would have to do the work at much expense without having any decision of the courts as to their rights, and at the risk of being ordered to pull it down if they were wrong.

So much for the remedy under s. 17. Is it the only remedy? That depends on the true interpretation of the Act. I take it to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words. In *Barraclough v. Brown* (1), the words were sufficiently clear. In that case Parliament had

"... by plain implication, enacted that no other court has any authority to entertain or decide these matters";

see per LORD WATSON. That is shown by *Francis v. Yiewsley & West Drayton Urban District Council* (2) where a man was aggrieved by an enforcement notice served under the Act of 1947. He said that it was invalid. The Act gave him a remedy by way of appeal to a court of summary jurisdiction. Section 23 (4) said "he may" appeal. The planning authority argued that that was the only remedy. But McNAIR, J., and this court held that the existence of the statutory remedy did not bar him from seeking a remedy by declaration. McNAIR, J., said:

"It is a fundamental rule that if a subject is to be deprived of a right of coming to these courts, it must be in clear words."

I entirely agree. Applying this principle, I find nothing in the statute to bar recourse to a declaration. Section 17 is no doubt a convenient remedy. It enables a ruling to be obtained from the Minister in a way which is simple and inexpensive; but it is not the only remedy. Section 17 says that "he may" apply to the local planning authority, not that he *must* do so. The proposed work may be of such importance that the developer may desire the ruling of the High Court before starting on it. The only means of getting such a ruling is by an action for a declaration, and I see nothing in the Act to bar it. In my opinion, the preliminary objection fails.

I turn, therefore, to the substantial dispute. The company says that the working of these areas is covered by the Town and Country Planning General Development Order, 1950, and does not need the permission of the local planning authority or of the Minister. The General Development Order permits any development to be carried out if it is

"Development authorised by any local or private Act of Parliament ... being an Act ... which designates specifically both the nature of the

(1) 62 J.P. 275; [1897] A.C. 615.

(2) 122 J.P. 31; [1957] 2 All E.R. 529.

development thereby authorised and the land upon which it may be carried out "

(see art. 3, and class xii of sched. 1). The company say that the development of these areas is authorised by the Malvern Hills Act, 1924, but the Minister disputes it.

The dispute depends on the true effect of the Act of 1924. It appears from the recitals that the amenities of the Malvern Hills were threatened by quarrying operations. Parliament desired to save the beauty of the Hills; but the quarry owners had vested rights of quarrying which they claimed should not be taken away without compensation. There seems to have been much negotiation in the course of the Bill through Parliament. In the result, Parliament, by s. 26 and s. 27 of the Act, empowered the Minister, on the application of the Malvern conservators, to make orders prohibiting quarrying on any particular part of the Hills; but the conservators had to pay compensation to the owners affected. This obligation to pay compensation would have a restrictive effect on attempts to preserve the Hills. The conservators might not be able to afford to buy out some quarry owners such as the company. Negotiations therefore took place between the company, the Malvern conservators and the Malvern council, as a result of which "Heads of Agreement" were drawn up, under which the company were to give up their right to quarry many acres of land over which they held a licence, and were to limit their rights of quarrying to twenty-three acres of licensed land. (This was outside their freehold property which was not affected by the Act.) The heads of agreement were confirmed and made binding by s. 54 of the Act which said that:

"For the protection of the Pyx Granite Company Limited the following provisions shall, unless otherwise agreed in writing between the company and the conservators and the Malvern council, have effect (that is to say): The heads of agreement as set forth in Sch. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council, and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

The heads of agreement contemplated that a formal agreement should be executed; and after some differences (which were only resolved after a decision of the Court of Appeal on June 24, 1925) a deed was executed on Dec. 14, 1925, by the Malvern council, the Malvern conservators and the company. By this deed the company agreed not to quarry in any part of the Malvern Hills except their freehold property, and the quarryable areas there defined; and it was agreed that the company's rights to quarry stone on their freehold property were not to be prejudiced or affected by the deed. The upshot of it all was that by agreement the company gave up their right to quarry on a considerable area of land in return for a promise by the Malvern conservators and the Malvern council that the rights of the company to quarry stone on their freehold property and on some twenty-three acres of licensed land should be left undisturbed. This amounted, I think, to an implied agreement by the Malvern conservators and the Malvern council authorising the company to quarry stone within those limits. But was this authorised by the Act? The company say that it was authorised by virtue of s. 54. The Minister disputes it.

This is a difficult question, and I can well understand the approach of the judge to it. Seeing that the heads of agreement were "confirmed and made binding" by the Act, it looks as if the provisions thereof (express or implied) were authorised by the Act; but we were referred to a case, which was not cited to the

judge, and which throws a different light on the problem. It is *R. v. Midland Ry. Co.* (1), and the speech of LORD CAIRNS in *Caledonian Ry. Co. v. Greenock & Wemyss Bay Ry. Co.* (2) which was quoted in it. That case shows that there are two ways in which Parliament can give validity to the provisions of an agreement not yet formally completed. It can make the provisions as *binding as a contract*, simply dispensing with the execution by the parties; or it can make the provisions as *binding as a statute*, giving them the same force as if enacted in the statute itself. What has Parliament done here? It seems to me that s. 54 does no more than make the heads of agreement as binding as a contract.

At that time the heads of agreement had not been executed by the parties, but they were nevertheless "confirmed and made binding" on the parties, who could "otherwise agree" in writing. That is typical of a contractual bond. The section goes on to say that the provisions of the Act are only to apply to the company's undertaking "subject to the provisions of the said heads of agreement". That is no more than saying that the provisions are to be regarded as a "contracting out" of the Act with the sanction of Parliament. The last paragraph of the heads of agreement contemplated that a formal agreement should be prepared and executed by the parties. This was done on Dec. 14, 1925, by a deed which thenceforward replaced the heads of agreement. In these circumstances, I think that the provisions of the heads of agreement cannot be regarded as equal to a statute, or as carrying the authority of Parliament, but only as of contractual force. The development of these quarryable areas was authorised by the agreement, but not by the Act of Parliament. It does not come, therefore, within the General Development Order, but needs the special permission of the local planning authority, or the Minister.

This is not the end of the case because the company long ago took steps to safeguard their position. On Nov. 17, 1947 (whilst the earlier Planning Acts were in force), they applied to the Malvern council for permission to develop the land for quarrying purposes. On Jan. 14, 1948, the Minister "called in" the company's application for decision by himself in so far as it concerned the winning and working of minerals by surface working. When the Act of 1947 came into operation, the company's application was, by the statute, to be treated as if it was made under that Act. A local inquiry was held. By the letters of Sept. 5, 1949, and Sept. 30, 1953 (to which I have already referred) the Minister granted permission in respect of part of the land, but imposed conditions to which the company object. The conditions required that the company should take away their plant and machinery when they had finished, and so forth. The company say that the conditions are invalid in whole or in part, and seek a declaration to that effect.

Counsel for the Minister on this part of the case takes another preliminary objection. There is nothing here corresponding to s. 17 on which he previously relied. But he relies on the wide discretion given by s. 14 to the planning authority to impose conditions, and says that this discretion is not open to proceedings for a declaration. He read us passages from *Barnard v. National Dock Labour Board* (3) and sought to deduce therefrom that the remedy by declaration only lies where there is no jurisdiction, not where it is wrongly exercised. I do not think that there is any such limit to the remedy by declaration. The wide scope of it can be seen from the speech of VISCOUNT KILMUIR, L.C., in *Vine v. National Dock Labour Board* (4) from which it appears that, if a substantial

(1) (1887), 19 Q.B.D. 540.

(2) (1874), L.R. 2 Sc. & Div. 347.

(3) [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18.

(4) [1956] 3 All E.R. 939.

question exists which one person has a real interest to raise and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

Counsel for the Minister also said that if the conditions are invalid, the only remedy is by certiorari, and not by declaration, thus implicitly admitting that there ought to be a remedy, but that the company had pursued the wrong form of it. He assumes that certiorari would lie to quash, but I am by no means sure about this. Certiorari is confined to judicial acts; and it can be argued that the Minister, when granting planning permission, is not acting judicially, but administratively, and that his decision is, therefore, not subject to certiorari. Counsel said that it is sufficiently near a judicial decision to be the subject of certiorari, and referred us to *R. v. Hendon Rural District Council, Ex p. Chorley* (1). But since that case there have been the decisions of the Privy Council in *Nakkuda Ali v. Jayaratne (M.F. De S.)* (2) and of the Divisional Court in *R. v. Metropolitan Police Comr., Ex p. Parker* (3) which have restricted the scope of this remedy. If is one of the defects of certiorari that it so often involves an inquiry into the distinction between judicial acts and administrative acts which no one has been able satisfactorily to define. No such difficulty arises with the remedy by declaration, which is wide enough to meet this deficiency, as this court had occasion to point out in *R. v. London County Council, Education Committee, Staff Sub-Committee, Ex p. Schonfeld* (4). It applies to administrative acts as well as judicial acts whenever their validity is challenged because of a denial of justice, or for other good reason. It is clearly available to enable the court to declare whether conditions imposed by a licensing authority are valid, no matter whether that authority is acting judicially or administratively: see *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (5). There are very good reasons here for entertaining a claim for a declaration. If these conditions are valid, they operate as a land charge, and must be entered in the register of land charges. It may be very important for the owner, or any proposed purchaser, to know whether they are valid or not before he commits himself to the proposed development. No statutory remedy is available for the purpose, and the best, if not the only, remedy is by way of a declaration. In my opinion, therefore, this preliminary objection also fails.

This brings me to the question whether the conditions imposed in this case are valid or not. The particular conditions to which the company object are those concerned with the plant and machinery which has been used in the quarries for years—not for actually winning the stone and getting it out of the ground, but for crushing it and putting it into a marketable state. The company say that they do not need permission to use this plant and machinery because they are using it in the same way as it was used before 1947. Yet the Minister has imposed conditions such as these: (1) He requires that crushing and screening shall only be operated between such hours as may be agreed, and that steps shall be taken to control the emission of dust therefrom. (2) He requires that all plant, machinery and foundations shall be removed when they are no longer required, and the site left in a tidy condition. The Minister claims to impose these conditions under the general power contained in s. 14 (1), or alternatively under the special power contained in s. 14 (2) (a). The company say that

(1) 97 J.P. 210; [1933] 2 K.B. 696.

(2) [1951] A.C. 66.

(3) 117 J.P. 440; [1953] 2 All E.R. 717.

(4) [1956] 1 All E.R. 753.

(5) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

if the Minister wishes to impose such conditions, he can only do it under the powers contained in s. 26 which give a right to compensation under s. 27.

The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose "such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however bona fide, the court can interfere by declaration and injunction: see *Sydney Municipal Council v. Campbell* (1); *Roberts v. Hopwood* (2) and *Smith v. East Elloe Rural District Council* (3). This principle was applied in a planning case where the London County Council gave permission for some manufacturers to erect a new factory on a new site, but sought to impose a condition that their existing works on the old site should close down as soon as the new factory was brought into use. This condition was desirable in the interests of the over-all planning of the area. But the Minister was advised (rightly, I think) that the condition could not properly be imposed as it was, in part, an attempt to suppress existing development by depriving the manufacturers of the right to use their existing factory; and that suppression of an existing use of this kind could only be achieved by an order under s. 26; see the Bulletin of Selected Appeal Decisions (VII/12). The company say that the conditions to which they object here are invalid for a similar reason, namely, as an attempt to impose conditions on the continuance of an existing use which can only be achieved by an order under s. 26.

The judge thought that the company were right on this point, and it is only after much hesitation that I differ from him. I cannot shut my eyes to the fact that this plant and machinery is ancillary to the getting of stone from the quarries. The company win the stone from the working face, and for that operation they certainly have to get permission. Then they crush the stone and screen it, not actually at the place where they are excavating, but very near to it. If the question depended on the general words of s. 14 (1) there might be a doubt whether the conditions were valid; but the special words of s. 14 (2) were inserted so as to clear up any doubts about s. 14 (1), and they seem to me to cover this case. These conditions require "the carrying out of works" on land under the control of the company—although it is not the land in respect of which the application for permission relates—and they can properly be regarded as expedient "in connexion with" the permitted development.

I see no reason to attribute to the Minister any ulterior object. He evidently takes the view that if the company wish to win and work stone from these quarries for some years to come, they should take steps to ensure that there is as little nuisance as possible either from the blasting operations or from the ancillary operations of crushing and screening the stone; and that they should clear up the place when they have finished. There is nothing unfair or unreasonable about that. After all, if the company do not wish to accept the permission on those conditions, their remedy is not to work the quarry; but if they do continue to work the quarry, they can fairly be expected to comply with these conditions. It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away. It might well be that that could only be done by an order under s. 26. But here the plant and machinery is on the

(1) [1925] A.C. 338.

(2) 89 J.P. 105; [1925] A.C. 578.

(3) 120 J.P. 263; [1956] 1 All E.R. 855; [1956] A.C. 736.

spot, and the conditions are so closely "in connexion with" the permitted development as to be valid.

In my opinion, therefore, although there is no technical barrier to the granting of declarations, the company have not succeeded in establishing a case for them. I would allow the appeal accordingly.

HODSON, L.J.: The first question is whether or not the court can grant the declaration first made by the learned judge. Section 17 (1) of the Town and Country Planning Act, 1947, provides statutory proceedings for the determination of any question whether the carrying out of certain operations on land would constitute or involve development within the meaning of the Act for which, having regard to the provisions of any development order, permission is required to be obtained by application. A person who proposes to carry out operations *may*, in the words of the section,

"... either as part of an application for such permission, or without any such application, apply to the local planning authority to determine that question."

The effect of s. 17 (2) read with its prior provisions s. 15 (1), (2), and (3) is that any decision of the Minister given on an application made under s. 17 (1) to determine the above question is final save and except that provision is made for appeal against an order made for the enforcement of planning control.

In these circumstances, the principles laid down in *Barracrough v. Brown* (1) are, in my judgment, applicable. The headnote of this case reads as follows:

"Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction; he can only take proceedings in the latter court."

LORD HERSCHELL said:

"... it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right ... determined."

LORD WATSON said:

"It cannot be the duty of any court to pronounce an order when it plainly appears that, in so doing, the court would be using a jurisdiction which the legislature has forbidden it to exercise."

The learned judge disposed of this objection by reference to the date of the original application to the Minister, which was prior to the date of the coming into force of the Act of 1947, videlicet 1948, but the material matter to be considered is this action for a declaration which was commenced by writ in December, 1954, and the jurisdiction of the court to grant a declaration must be considered independently of whether any application has or has not been made to the local planning authority under s. 17. The position of the court is the same whether or not the local planning authority or the Minister has made a determination. Planning is itself the creature of statute, and Parliament has provided its own method for the determination of the question here involved, videlicet whether planning permission is required. No significance is to be attached to the use of the word "may", which is the only word apt for the purpose. Indeed, it would not be sensible to make it compulsory for persons to seek a determination

if they did not consider it in their interest to do so. The same permissive word "may" is contained in the statute under consideration in *Barraclough v. Brown* (1). Although the section now in question is directed to a different purpose from that involved in that case, there is to my mind no distinction in principle. The declaration sought must look to the future just as the determination to be sought under s. 17, and I can see no good ground for distinguishing this case on the ground that the declaration speaks in the present tense. It is said further by the company that it is inconvenient as between vendor and purchaser not to know whether there was an enforcement notice, and that therefore it is in practice highly desirable to be able to obtain a declaration of this nature; but I do not find that this argument carries the matter any further. The risk of planning interference by the Minister cannot be avoided, and a safeguard is provided by s. 17 itself. In my opinion, the legislature has by s. 17 given exclusive jurisdiction to the local authority, and the Minister and this court cannot be asked to make the declaration sought.

If I am wrong as to this, the question is whether the Minister and the local planning authority are entitled to succeed on the ground that the company were not authorised by the Malvern Hills Act, 1924, to develop their land for the purpose of winning and working of minerals by surface working in their quarries. The company rely on the words of class xii of Sch. 1 to the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958) made pursuant to the Act of 1947, revoked and replaced by the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728) which contains, so far as material, an identical schedule of permitted development. Class xii contains this:

"Development authorised by any local or private Act of Parliament or by any order approved by both Houses of Parliament, being an Act or Order which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

The sole question is whether there has been such an authorisation.

It is to be observed, first, that the company required no statutory authority to work their undertaking. Secondly, the Malvern Hills Act, 1924, as its preamble shows, was an Act framed to preserve the amenities of the Malvern Hills, and to deal with the interference with those amenities by quarrying operations, and by the erection of buildings, sheds, machinery and plant. By ss. 25, 26 and 27 of the Act, the conservators might make and enforce bye-laws to regulate quarrying in on or under the Malvern Hills, and regulate the erection of buildings, etc., and the Minister of Agriculture and Fisheries might make orders for the prohibition of quarrying. Sections 28, 29 and 30 deal with procedure and enforcement of orders of the Minister. Section 54 of the Act is as follows:

"For the protection of the Pyx Granite Company Limited (in this section referred to as 'the company') the following provisions shall unless otherwise agreed in writing between the company and the conservators and the Malvern council have effect (that is to say):—The heads of agreement as set forth in sched. 4 to this Act are hereby confirmed and made binding on the company and the conservators and the Malvern council and the provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

The heads of agreement are set out in sched. 4 and contain the following paragraph:

(1) 62 J.P. 275; [1897] A.C. 615.

"A clause to be inserted in the Bill excluding the undertaking property and rights of the company from its operation except that bye-laws may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public."

No such clause was ever inserted, and in 1925 it was held by the Court of Appeal in *Pyx Granite Co., Ltd. v. Malvern Hill Conservators and the Malvern U.D.C.* (1) that, the legislature not having seen fit to insert this clause in the Act when it became law, the court could not, by a process of construction, produce the same result so that the undertaking of the company remained subject to the powers conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction. Thus the Act of 1924 did not exclude the company's land from its operation.

There is nothing in the Act which specifically authorises the company to carry on their quarrying or any other activities, but it is argued that by countenancing these activities there has been an authorisation within the meaning of class xii of sched. 1 to the development orders to which I have referred. The provisions of the Act are restrictive, and there is nothing in the agreement which is part of the Act except a variation of the rights of the parties to the agreement not amounting in any sense to the giving of any new authority to the company to work. Statutory confirmation of the agreement does not put the parties in a different position from that which they would have occupied if they had made an agreement which had not been so confirmed. Rights conferred by agreement are none the less conferred thereby when the agreement is confirmed by Act of Parliament. Authorisation involves the need for sanction, as is illustrated by s. 22 of the Act of 1924 and the second and third schedules thereto, where the conservators are specifically authorised to purchase quarries, etc., notwithstanding anything contained in certain earlier Acts.

This construction of the Act of 1924 as not in itself authorising the company to do anything is, in my opinion, supported by the judgment of the Court of Crown Cases Reserved in *R. v. Midland Ry. Co.* (2), which was not referred to in the court below. The question there was whether, under s. 8 of the Regulation of Railways Act, 1873, a difference between railway companies was, under the provisions of any general or special Act, required or authorised to be referred to arbitration. Two railway companies had agreed that all questions of difference arising out of their agreement should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, and a private Act was subsequently passed to which the agreement was scheduled and by which it was provided that the scheduled agreement should be confirmed and made binding. It was held that the right to refer to arbitration was derived from the agreement, and that the difference was not

"required or authorised to be referred to arbitration under the provisions of any general or special Act"

within the meaning of s. 8. In other words, the recognition of the agreement was not an authorisation to refer to arbitration.

The same situation exists here. The company were not authorised by the Act of 1924 to do anything, and the fact that their agreement with other parties has been embodied in an Act of Parliament does not amount to authorisation.

(1) Unrep. May 11, 1925.

(2) (1887), 19 Q.B.D. 540.

There is nothing here to correspond with the words in *Caledonian Ry. Co. v. Greenock & Wemyss Bay Ry. Co.* (1), referred to in the judgment of STEPHEN J., where the clause to be construed, after saying that the agreement was valid and obligatory, went on to say that

"the companies are hereby required to implement and fulfil all the provisions and stipulations thereof."

The judgment of WILLS, J., in *R. v. Midland Ry. Co.* (2) begins as follows :

"Broadly stated, and apart from technicality, the question is whether in a case where an agreement between two companies to which the Act of 1873 refers, containing a reference clause, has been embodied in an Act of Parliament, the necessity or the privilege, as the case may be, of having their disputes referred to arbitration has been created by the express command of the legislature, or is the off-spring of agreement between the parties, the action of Parliament having been confined to the removal of obstacles, actual or apprehended, to their power so to contract."

WILLS, J., answered the question by saying that the reference clause was the off-spring of the agreement between the parties. The view of the court was clearly that the requisition or authority then in question was a requisition to do that which the companies were not called on to do otherwise, and an authority to do that which they were not authorised to do without the Act. In my judgment, the Minister and the planning authority are right in their submission that the company were not authorised within the meaning of the General Development Order.

It is also to be noticed that the Tank Quarry, part of the company's undertaking, was not, so far as the schedule to the Act of 1924 and the plan annexed thereto shows, part of the Malvern Hills area, unless it can be said that the conservators have acquired an interest in it within the meaning of s. 5 of the Act. There is, so far as I know, no evidence of this, but it is not necessary to pursue this matter in view of the fact that the North Quarry is within the Malvern Hills area, and included in the schedules to the Act.

The only remaining question is as to the conditions imposed by the Minister. I have nothing to add on this subject to the views expressed by my Lord as to the validity of the conditions generally. In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the company would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them.

Moreover, it is doubtful whether at this time the Minister's decision could properly be impeached by declaration. That could have been done by certiorari: see *R. v. Hendon Rural District Council, Ex p. Chorley* (3); but the time for this has long since passed. Such proceedings, if successful, could only, in my opinion, have led to the result I have indicated, namely, the quashing of the whole permission, and not the leaving of the permission standing shorn of all or some of its conditions. I would allow the appeal.

(1) (1874), L.R. 2 Sc. & Div. 347.

(2) (1887), 19 Q.B. 540.

(3) 97 J.P. 210; [1933] 2 K.B. 696.

MORRIS, L.J.: When the company made application on Nov. 17, 1947, for permission to develop their land with quarrying undertakings thereon, the Town and Country Planning Act, 1947, had been passed, but most of its provisions had not come into force. The provisions of the Town and Country Planning Interim Development Order, 1946 (S.R. & O. 1946 No. 1621) were then in operation. That order was made under the Town and Country Planning Acts, 1932 to 1944. It was provided by s. 10 of the Town and Country Planning Act, 1932, that the Minister should make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied.

In reference to the area now in question there had, on July 25, 1934, been a resolution to prepare a scheme. That resolution had been approved by the Minister on Sept. 28, 1934. Interim development for the purposes of s. 10 meant development between the date on which a resolution took effect, and the date of coming into operation of a scheme. Under para. 4 (1) of the Order of 1946 certain development could be undertaken without the permission of the interim development authority. Class of development Class I included (with certain exceptions) development authorised by any Act of Parliament which specifically designated the land on which the development could be carried out. Another class (see class v) included the carrying out by mining undertakers (subject to certain exceptions) on land comprised in their undertaking of any development required for the purposes of their undertaking.

The Minister in fact called in the company's application of Nov. 17, 1947. When he dealt with it, he did so under the provisions of the Town and Country Planning Act, 1947, which came into operation on July 1, 1948. That Act provides (see s. 12) that permission is required under Part 3 of the Act in respect of any development of land which is carried out after the appointed day when the Act came into force. Under the Act, development is defined to mean (subject to certain exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 13 of the Act required the Minister to provide by order for the grant of permission for the development of land under Part 3 of the Act, which permission, in the case of any development specified in the order, might be granted by the order itself, or in other cases might be granted by the local planning authority or in certain cases by the Minister. On May 5, 1948, the Minister made the Town and Country Planning (General Development) Order, 1948 (S.I. 1948 No. 958). On May 8, 1950, the Minister made the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728). Paragraph 3 (1) of that order provides as follows:

"Subject to the subsequent provisions of this order, development of any class specified in sched. I to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or the Minister: Provided that the permission granted by this order in respect of any such class of development shall be subject to any condition or limitation imposed in the said Sch. I in relation to that class."

Class xii of sched. I refers to:

"Development authorised by any local or private Act of Parliament . . . which designates specifically both the nature of the development thereby authorised and the land upon which it may be carried out."

If the development referred to by the company in their letter of Nov. 17, 1947,

comes within the words which I have just cited, then the company had permission for such development, and no further permission of the local planning authority or of the Minister was needed. When, at a much later date, that is in July, 1952, an inquiry was being held, the company put forward their submission that they need not have applied for planning permission. They invited a dismissal of their application by the Minister on the ground that no further permission was required. It may seem unfortunate that steps could not then have been taken to obtain the ruling of the court so that the uncertainty could then be resolved, and further unnecessary labour and inquiry avoided. Recourse to the courts was not, however, then sought, and the main question now to be determined is whether the company were permitted to do what they proposed without obtaining any special permission. Whether the provisions of the Order No. 1621 of 1946, or of S.I. 1948 No. 958, or of S.I. 1950 No. 728 are regarded, the principal issue is whether the development proposed by the company is development that was authorised by the Malvern Hills Act, 1924. It seems to me that the Malvern Hills Act, 1924, designated both the nature of the development to be carried out by the company, and the land on which the development was to be carried out. The question is, therefore, whether that Act authorised the quarrying activities of the company.

The recitals in the preamble of the Malvern Hills Act, 1924, show that there was great concern to preserve the beauties of the Malvern Hills, and to limit the interference with the amenities of the area which must result from quarrying operations and the erection of buildings, sheds, machinery and plant. The company was an existing company engaged in the business of quarrying stone. The company was clearly interested, and the company opposed the Bill when it was introduced. There were certain manifest conflicts. On the one hand there was a desire to maintain natural beauty; on the other hand there was a necessity to obtain a certain output of stone. Those owning lands which contained valuable stone had an interest to develop their property commercially. Such interest might, if uncontrolled, run counter to the public interest of preserving the amenities of the Malvern Hills

“for purposes of health recreation and enjoyment and the prosperity and development of the district.”

After negotiation, agreement was reached between the company and the promoters of the Bill. The settlement that was reached involved that the company should continue to quarry on their freehold land, should abandon their rights in regard to a certain area, and, while retaining existing rights on a part of the North Quarry area, should have transferred to them additional rights relating to other parts in the North Quarry area. The arrangements recorded in Sch. 4 to the Act of 1924 were most detailed. There was a plan which was signed by the chairman of the committee of the House of Lords to whom the Bill was referred. The first paragraph of the heads of agreement set out in Sch. 4 recorded:

“The company's rights of quarrying to be limited (outside their freehold property) to the quarryable area at North Malvern defined on a plan to be signed by the Right Honourable the Lord Islington the Chairman of the Committee of the House of Lords to whom the Bill is referred a copy of which is to be supplied by the conservators to the company.”

The plan which was signed showed: (a) the company's freehold property; (b) other areas of the hill land on which the company were to quarry; (c) an area in reference to which the company had a lease, but in which they agreed

to relinquish their quarrying rights. The effect of the agreement was that there was a limitation of the area which would be subject to quarrying by the company.

The heads of agreement provided (see cl. 18) that the provisions were to be inserted in an agreement. An agreement was entered into on Dec. 14, 1925. Before that date there was litigation between the company and the conservators and the Malvern Urban District Council, which resulted in judgments in this court on June 24, 1925. The principal issue in the litigation concerned the meaning and effect of cl. 14 of the heads of agreement. It was held that that clause contained a transitory provision having no force or effect when the Bill became an Act. It would appear from the judgment of WARRINGTON, L.J., that one of the chief matters in controversy was whether bye-laws would bind the company. WARRINGTON, L.J., said in his judgment:

"The substantial point to be decided is whether, on the true construction of the Malvern Hills Act, 1924, the undertaking, property and rights of the plaintiffs [the company] are or are not subject to the powers by the Act conferred on the conservators of making bye-laws for the regulation of quarrying in the area subject to their jurisdiction."

It was held that the company would be so subject, though it may be noted that when later the agreement of Dec. 14 was actually made, it was provided by para. 4 (b) as follows:

"No bye-law made by the conservators under s. 25 of the Act shall affect the company's quarries except such as may be made with the approval of the Home Secretary (after notice to the company) in regard only to blasting operations in the company's quarries for the protection of the public."

Section 22 of the Act of 1924 gave certain powers to the conservators to purchase certain lands, property and quarries described in Sch. 2 and Sch. 3 to the Act. Those schedules included what are known as the "Foley Quarries". The interests which the Malvern council were to transfer to the company so as to give additional quarries to the company related to the Foley Quarries. The agreement recorded in Sch. 4 gave to the conservators an option to purchase the company's undertaking as a going concern at the expiration of two years after written notice of intention should have been given to the company during the third, fourth or fifth year after the passing of the Bill. It would have seemed strange if, after an agreement under which additional quarrying rights were secured to the company subject always to a provision that the conservators might exercise an option to purchase the whole undertaking, the conservators should have a general power given them by the Act to purchase quarries which would include the Foley Quarries. Section 54 of the Act gave "protection" to the company, and it was enacted that:

"The provisions of this Act shall only apply to or affect the undertaking property or rights of the company subject to the provisions of the said heads of agreement."

It was held in this court that s. 22 of the Act was superseded by the special provisions of cl. 12 and cl. 13 of the heads of agreement. WARRINGTON, L.J., in his judgment said:

"Section 22 contains a general power for the conservators to take certain quarries, including the Foley Quarries. The heads of agreement, by cl. 12 and cl. 13, provide specially that the conservators shall have the option to purchase at a certain time and on certain terms the entire undertaking of

the company. The general provision of s. 22 is superseded by the special provisions of cl. 12 and cl. 13."

ATKIN, L.J., concluded his judgment with the words:

"I agree that the special provisions in the rest of the heads of agreement override the more general provisions of the statute, and that the plaintiffs are entitled to the first declaration based upon paras. 12 and 13 of the heads of agreement."

The reference was to a declaration made by ROMER, J., in reference to one of the questions raised, which was propounded as follows:

"Whether notwithstanding the provisions of s. 54 of the Act and cl. 3, cl. 12 and cl. 13 of Sch. 4, the conservators are at present entitled to acquire the council's interest in the Foley Quarries under the provisions of s. 22 of the Act."

ROMER, J., [who had declared that the conservators were not so entitled] had further decided that, pending any acquisition by the conservators of the company's undertaking as a going concern under cl. 12 of sched. 4, the rights and interests of the company in the Gandolfi licences and in the Foley quarries were not subject to the jurisdiction of the conservators under the provisions of s. 25 to s. 31 of the Act of 1924. That part of the decision of ROMER, J., was reversed in this court. It would appear that in this court there was some concentration on the applicability of s. 25, which dealt with the power of making bye-laws.

It does not seem to me to be wholly clear whether it was being decided that the powers under s. 26 of the Act of 1924 could be exercised in reference to the quarrying areas defined in sched. 4. Section 26 of the Act gives power to the appropriate Minister, on the application of the conservators, to make orders prohibiting quarrying on any specified part of the Malvern Hills; any such order would be subject to a provision for the payment of compensation. In view of the terms of s. 54 that the provisions of the Act only apply to or affect the company subject to the provisions of the heads of agreement, and in view of the fact that sched. 4 records detailed agreed arrangements in regard to the company's rights of quarrying, and in view of the fact that the company were being given "protection", it might seem strange if the conservators had power to apply for an order which would prohibit the company from quarrying. The words of ATKIN, L.J., to which I have referred, and in particular the words

"the special provisions in the rest of the heads of agreement override the more general provisions of the statute"

might suggest that s. 26 and s. 27 were not applicable to the undertaking, property or rights of the company.

It is not, however, in my judgment necessary to consider this particular matter further, for the issue now arising is really whether the activities of the company were "authorised" by the Act of 1924. That Act was one which effected most carefully worked out planning in regard to the Malvern Hills. The conservators were given additional powers. The company agreed to a limitation and fixation of their rights. From their previously existing rights something was extracted, and to them something else was added. The company's rights were limited, outside their freehold property, to a defined quarryable area. It was implicit in the agreement made that the continuing rights of the company to quarry on their freehold area were recognised. The company were to supply the council with stone for the repair of roads. The company were

to put in repair a quarry road between certain defined points, and were to keep such road in repair. The company were to widen the quarry road to permit of a footpath by the side of it. The company were to be at liberty to make and use a tunnel under the area of land dividing their freehold property from the quarries which the council were handing over to the company. All this elaborately worked out detailed planning was, in my judgment, formally approved by Parliament when it provided by s. 54 that

"for the protection of the company [the Act should] only apply to or affect the undertaking, property or rights of the company subject to the provisions of the heads of agreement."

It seems to me that formal approval and sanction were given by Parliament to the activities of the company as planned and arranged within the scope of the agreement that was made. In this way the activities of the company which constituted "development" were, in a very real sense, "authorised" by the Act of 1924. Parliament enacted that the specific arrangements (under which the range of the company's activities was defined and limited) were confirmed and made binding on the company, the conservators and the Malvern council. I feel impelled to the view that Parliament authorised the arrangements which it confirmed and made binding.

It was submitted that the decision in *R. v. Midland Ry. Co.* (1) negated the view that in the present case development was "authorised" by the Malvern Hills Act, 1924. In that case an agreement had been entered into between the Midland Railway Company and two companies, the Great Western and the West Midland Railway Companies, which two companies were to be amalgamated. At a later date, by the Act of Parliament which effected the amalgamation, the previous agreement was "confirmed and made binding upon" the Midland and Great Western Railway Companies. The agreement had contained an arbitration provision. It was held that differences which later arose were not differences which "under the provisions of any general or special Act" were "required or authorised to be referred to arbitration". In that case, the agreement between the Midland Railway Company and the two other companies (who, for the purposes of the agreement, were to be considered as one company) was entered into on Mar. 17, 1863; there were, under the agreement, various provisions for through rates and charges, and for through bookings, and for mutual interchange of traffic, and there was the provision for a reference to arbitration in manner provided by the Railway Companies Arbitration Act, 1859, of all disputed questions as to fares, rates and charges, and of other questions of difference arising out of the agreement. Later, the Great Western Railway (West Midland Amalgamation) Act, 1863 (26 & 27 Vict. c. cxiii), amalgamated the Great Western and West Midland Companies. That Act was passed on July 13, 1863. By s. 63, the agreement of Mar. 17, 1863, was "confirmed and made binding upon" the Midland and Great Western Railway Companies.

The Regulation of Railways Act, 1873, provided by s. 8 for a reference to the Railway Commissioners of differences which "under the provisions of any general or special Act", were "required or authorised to be referred to arbitration". Certain differences arose. The Midland Railway wanted the differences referred to the Railway Commissioners, and relied on s. 8 of the Act of 1873; they said that under the provisions of the Act of 1863, which was passed on July 13, 1863, the differences were "required or authorised to be referred to

(1) (1887), 19 Q.B.D. 540.

arbitration". The Great Western Railway wanted the differences settled under the machinery of the Arbitration Act, 1859, as the parties had provided for in their agreement made on Mar. 17, 1863; they said that though that agreement had been "confirmed and made binding upon" the Midland and Great Western Companies by the Act passed on July 13, 1863, that did not alter the fact that the companies had, by their agreement of Mar. 17, chosen a particular form of reference, and accordingly that the differences were not such as "under the provisions" of the Act of 1863 were "required or authorised" to be referred to arbitration. The agreement between the parties which provided for arbitration was made four months before the Act was passed, and commenced on July 1, 1863. The Great Western Company succeeded. In examining the meaning of s. 8 of the Act of 1873, STEPHEN, J., said:

"It seems to me that its object is to enable the Railway Commissioners to have questions referred to them for their decision where the arbitration rests upon the authority of Parliament, where there is some special authority of Parliament which requires or authorises it; that is to say, cases in which the Railway Companies could not by their own manner of constitution and according to their own independent powers, do the thing for themselves."

The parties had, however, done it for themselves by their agreement of Mar. 17. WILLS, J., in his judgment said:

"If it was substantially the action of Parliament and the will of the legislature which imposed on the parties the necessity, or conferred on them the right, to go to arbitration, then Parliament may change the forum, and has elected so to do."

In the present case we are not concerned with the phrase "required or authorised", but only with the word "authorised". The word "authorised" appears in a great many statutory provisions. It does not mean the same as "required". Its meaning in any particular case must, I think, be deduced from the context, and must depend on the context. In some instances, statutes are merely permissive: see *Simpson v. A.-G.* (1), where a person was authorised and empowered to improve the passage for boats on a river. When the Trustee Act, 1925, refers to "authorised investments", that phrase means (see s. 68) investments authorised by the instrument (if any) creating the trust for the investment of money subject to the trust, or by law. When the Money-lenders Act, 1927, refers to an "authorised name" or "authorised address", those expressions respectively mean (see s. 15) the name under which and the address at which a moneylender is authorised by a certificate granted under the Act to carry on his business as a moneylender. In *Evans v. E. Hulton & Co., Ltd.* (2) TOMLIN, J., pointed to the applicability of the dictionary definition of "to authorise", that is "to give formal approval to, to sanction, approve, countenance". The word "authorised" must, therefore, be considered in its context and in its setting. I cannot think that in its context in planning regulations it need be limited to rights newly conferred by an Act of Parliament. I consider that it extends also to rights recognised and sanctioned by an Act of Parliament.

It is to be observed that s. 35 of the Town and Country Planning Act, 1932 (following s. 16 of the Town Planning Act, 1925), refers to an "authorised association", and by s. 35 (7), an authorised association is defined to mean a society, company or body of persons with certain specified objects, and which

(1) 69 J.P. 85; [1904] A.C. 476.

(2) (1924), 131 L.T. 534.

satisfies certain conditions, and which is "approved" by the Minister. In the context now being considered, it seems to me that the development which is referred to is development which Parliament has had under consideration, and has, in the case of operations which have not been begun, conferred a right to undertake them, or in the case of some operations already begun has recognised and sanctioned and approved their continuance. Parliament might, for example, do so by giving some exemption or protection from the application to them of certain provisions which Parliament is then enacting. Though, as mentioned hereafter, certain overriding powers are reserved to the Minister or the local planning authority, it would seem reasonable that, subject to the exercise of those powers, there should be no need for further permission in the case of some development operations which constitute a carefully adjusted piece of planning, and which, having come under the consideration of Parliament, have received express recognition.

At the time of the passing of the Malvern Hills Act, 1924, the company had certain existing rights in reference to its freehold land; it also had rights under licences. When the conservators were asking for extended powers, they were opposed by the company. The company might have defeated the Bill. But a settlement was reached, and terms of agreement settled; those terms only became effective and operative when the Act was passed. The company was given "protection". It gave up some rights in the interests of good planning, it received new rights. The Act was only to apply to the company subject to the agreement. In my judgment, applying the language of WILLS, J., quoted previously, it was "the action of Parliament and the will of the legislature" which conferred protection on the company, which protection recognised their existing rights in reference to their freehold property, and governed and defined their other rights. In my judgment, Parliament decreed a settlement which took into account public interest on the one hand, and private interests on the other. Though that settlement was negotiated by those concerned, Parliament then sanctioned it and countenanced it. As a piece of planning, in my judgment, they "authorised" it. I would regard the development operations of the company after the date of the passing of the Act of 1924 as having been done with the recognition, sanction and approval of Parliament, and accordingly, when planning is being considered, as having been done with the authority of Parliament.

It is to be noted that art. 4 (1) of S.I. 1950 No. 728 provides as follows:

"If either the Minister or the local planning authority is satisfied that it is expedient that development of any of the classes specified in Sch. 1 to this order should not be carried out in any particular area, or that any particular development of any of those classes should not be carried out, unless permission is granted on an application in that behalf, the Minister or the local planning authority may direct that the permission granted by art. 3 of this order shall not apply to:—(a) all or any development of all or any of those classes in any particular area specified in the direction, or (b) any particular development, specified in the direction, falling within any of those classes: Provided that, in the case of development of class xii, no such direction shall have effect in relation to development authorised by any Act passed after July 1, 1948, or by any order requiring the approval of both Houses of Parliament approved after that date."

A direction could, therefore, have been made having the result that the company would have needed express permission to undertake development. The existence

of this article (and see art. 4 of S.I. 1948 No. 958) would suggest that no unduly limited or restricted meaning should be given to the word "authorised".

It is to be remembered that wide powers of control are given by s. 26 of the Act of 1947; orders made under s. 26 may involve the payment of compensation under s. 27. Inasmuch as the company came to terms with the conservators and the council in 1924, and gave up certain rights that they had on the stated and recognised basis that they were continuing their rights of quarrying on their freehold land, and were being given "protection", it would seem to me to be a very unsatisfactory result if, without receiving compensation, they must cease operations in a few years' time. If new planning considerations and new policy demand some altered arrangements, it would seem but fair that they should be achieved by the exercise of powers that would entail the payment of compensation.

The Minister and the council submit that the company are not entitled to apply to the court for a declaration. They submit that the only right which the company had was to make an application to the planning authority under s. 17 of the Act of 1947. In my judgment, the wording of s. 17 denotes that an option is given to seek a determination by the use of the procedure of the section, but that the right which is given is not to the exclusion of any other rights. I do not consider that there is any withdrawal or negation of the right to come to the court for a declaration.

In *Barraclough v. Brown* (1) certain rights were by statute given to undertakers of navigation. If a boat was sunk in the river, the undertakers were given power to follow various courses. One of such courses was expressed in the words:

"or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge or vessel in a court of summary jurisdiction."

If the undertakers adopted that course, they could only recover the expenses in a court of summary jurisdiction, and not by bringing an action in the High Court. The defendants, who were sued in the High Court, were under no liability to pay the expenses at common law; the liability, if it existed, was created by the words of the statute as quoted above. As LORD HERSCHELL said:

"I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Nor, if he was compelled by statute to go to the court of summary jurisdiction, could he go first to the High Court to ask for a declaration that he could recover, for that was the very matter relegated to the inferior court. The High Court could not deal with a matter which the legislature, by plain implication, had enacted should be exclusively committed to the summary court.

In my judgment, there is no language in the Act of 1947 which debars the company from seeking the ruling of the High Court.

Though it is with diffidence that I arrive at a conclusion differing from my Lords, I consider that the learned judge was right in making the first declaration, and the first part of the second declaration. On this view, the questions which were argued in regard to the conditions and the right of the plaintiff company to seek a declaration as to them do not arise; but if I had shared the view that they do arise, I would have expressed my concurrence with the conclusions reached by LORD DENNING.

For the reasons which I have given, I would have dismissed the appeal.

LORD DENNING: The result of that is that by a majority (MORRIS, L.J., and myself) the technical points are held not good. In other words, there is power in the court to make a declaration. As to the substance of the matter, again by a majority (HODSON, L.J., and myself), we hold that this was not authorised by a local or private Act of Parliament, and therefore special permission is necessary. Then together we unanimously agree that the conditions imposed were valid.

We have to thank counsel for their assistance in a troublesome case which has taken a good deal of time for us to consider.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health; Sharpe, Pritchard & Co., for Clerk to Worcestershire County Council; Stephenson, Harwood & Tatham.*

H.S.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND WRANGHAM, J.)

February 4, 5, 1958

BOWEN v. BOWEN

Husband and Wife—Maintenance order—Application to vary—Order for discharge—Revival of discharged or revoked order—Magistrates' Courts Act, 1952 (15 and 16 Geo. 6 and 1 Eliz. 2, c. 55), s. 45 (2), s. 53.

The parties were married in 1950. They separated in February, 1952, and on May 3, 1952, an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, was made in the wife's favour on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her, the husband being ordered to pay her £2 a week as maintenance. On May 28, 1957, the wife was granted a decree absolute of divorce on the ground of the husband's adultery. The wife did not apply for maintenance in her divorce proceedings. On Sept. 27, 1957, the husband applied by complaint to the justices to vary the order of May 3, 1952, by reducing the amount of maintenance on the grounds that his means were reduced, that the wife's means were sufficient without the weekly sum of £2, and that the parties had been divorced. The justices revoked the order of May 3, 1952, and in their reasons stated, *inter alia*, that, if the wife's circumstances deteriorated, she could apply again to the court. On appeal by the wife,

HELD: the justices had no jurisdiction to revoke, which was equivalent to discharge, the order of May 3, 1952, since the husband's complaint was merely to vary that order; but in the circumstances the wife was entitled only to a nominal sum by way of maintenance.

Observations on the question whether an order which has been revoked or discharged can subsequently be revived under the Magistrates' Courts Act, 1952, s. 53.

APPEAL by wife against order of the Hereford county justices revoking an order made in the wife's favour on May 3, 1952.

In about February, 1952, the wife left the matrimonial home. On May 3, 1952, the justices made an order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had wilfully neglected to provide reasonable maintenance for her and ordered him to pay her the sum of £2 a week as maintenance. On May 28,

1957, the wife was granted in the Divorce Court a decree absolute on the ground of the husband's adultery. The wife did not apply in the divorce proceedings for maintenance. On Sept. 27, 1957, the husband made a complaint to the justices applying

"for the order of May 3, 1952 to be varied by an order requiring that the weekly payment of £2 be reduced on the grounds that the husband's means are reduced and the wife's means are sufficient without the weekly sum of £2 . . . and the marriage between the parties having been dissolved by a decree absolute dated May 28, 1957",

and a summons was issued on Oct. 3, 1957. On Oct. 5, 1957, the wife made a complaint to the justices applying to vary the order of May 3, 1952, by increasing the amount of maintenance, and a summons was issued on the same date. On Oct. 12, 1957, the justices heard both complaints; in respect of the husband's complaint the justices adjudged that "the complaint is true, and cause being shown upon fresh evidence to the satisfaction of the court" it was ordered that the order of May 3, 1952, be revoked. In respect of the wife's complaint the justices adjudged that that complaint was not true and ordered that the order of May 3, 1952, be revoked.

In their reasons the justices stated, *inter alia*:

"The magistrates bore in mind that if the wife's circumstances altered and deteriorated she could then apply to the court again. But that at present no order was justified or at the most a token allotment, which they felt was not justified . . ."

The wife appealed against the revocation of the order of May 3, 1952, and then appealed against both the order made on the husband's complaint and the order made on the wife's complaint.

A. T. Hoolahan for the wife.

P. E. Underwood for the husband.

LORD MERRIMAN, P.: Having regard to the fact that the justices' order requires variation in what may or may not be an important particular as a matter of substance, but does raise an important question as a matter of principle, I propose to say quite shortly with what we are and with what we are not dealing. The first thing at which to look in the present case is the complaint, and I may say at once that I do not, as at present advised, withdraw one word of what I am reported as having said about the importance of the complaint as the foundation of magistrates' jurisdiction in *Trathan v. Tratham* (1). In my judgment, with which DAVIES, J., agreed, I developed my use of the word "cardinal" to show that this court regarded the form of the complaint as a vital matter, because it is on that and that alone that justices are empowered to exercise their jurisdiction.

In the present case the husband's complaint was made on Sept. 27, and the summons was issued thereon, reciting the order of May 3, 1952, and following that with these words:

"and the complainant [husband] now applies for the said order to be varied by an order requiring that the weekly payment of £2 be reduced, on the grounds that the husband's means are reduced and the wife's means are sufficient without the weekly sum of £2 or a large part thereof, and the marriage between the parties having been dissolved by a decree absolute dated May 28, 1957."

It is perfectly clear that this complaint came under the head of a complaint to vary by reducing, stating those two grounds. I am fully aware, and it has been mentioned in this argument, that under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the same petty sessional division may

"on the application of the married woman or of her husband, and upon cause being shown . . . to the satisfaction of the court at any time, alter, vary, or discharge any such order [under the Act]."

I leave out for the moment the words "upon fresh evidence". I do not make any distinction whatever between "discharge" and "revoke", for they have been used interchangeably both in judgments and in the Act of Parliament, to which I do not think it is necessary to refer specifically, though both words have been contrasted (and this may be of importance in considering one authority) with a mere "cessation to have effect". That contrast occurs, as will be recognised, in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), whereby a resumption of cohabitation brings about the "cessation" of effect, just as the fact that the parties are living together at the time when the order is made prevents the order from coming into effect. Now, with regard to that combination of words, if I may, for the purpose of brevity, quote my judgment in *Trathan v. Trathan* (1), where, after I had pointed out that there was a distinction, quoad amount, between discharge, which almost certainly requires fresh evidence, and alteration or variation of amount which does not, by reason of a subsequent enactment, the Money Payments (Justices Procedure) Act, 1935, s. 9, which is now embodied in the Magistrates' Courts Act, 1952, I said:

"It is plain on the face of s. 7 itself that separate issues would be raised, and under the Magistrates' Courts Act, 1952, s. 43, as under the Summary Jurisdiction Act, 1848, s. 1, there must be a complaint which alleges that there should be an alteration and on what ground; or alleges that there should be a variation and on what ground; or alleges that there should be a discharge, and again on what ground, though in that case at least the ground must be based 'upon fresh evidence'."

I stand by those words, and for the purposes of the present case they are, as things stand, decisive, because there was before these magistrates no complaint for a discharge or a revocation, but merely a complaint for a variation. The order is quite explicit, in my opinion. The order perfectly accurately recites the terms of the husband's complaint, and the adjudication is that

"the complaint is true, and cause being shown upon fresh evidence to the satisfaction of the court, it is hereby ordered that the [order of May 3, 1952] be revoked."

In my opinion, although "fresh evidence" was not necessary to a pure question of amount, i.e., a reduction of amount, it was necessary and appropriate to the ground which is recited in the order, that the marriage had been dissolved; for, of course, it goes without saying that the dissolution of a marriage after the making of an order comes within the well-known definition of "fresh evidence", as being something which has manifestly occurred since the order was made. At the same time it was adjudged that the wife's complaint for an increase was not true, and it was ordered that the order of May 3, 1952, be revoked. I withhold any comment on the inclusion of that in reference to the wife's complaint; it does not matter, because the order is obviously made, in fact, on the husband's complaint. That is the formal order.

That brings me to what the magistrates said—what they really intended to do. If I may be allowed to say so they went into a very careful and close

examination of the figures, with the result that on the merits as disclosed by the figures they came to a conclusion from which I am not prepared to dissent. Their conclusion was that on the figures the wife was left with £2 5s. 6d., rather more than her husband was left with. I am not suggesting that that is a conclusive circumstance; far from it. They could ignore that if they chose, but they have chosen to act on it and to revoke the order altogether. They go into the question of there being no children; they go into the question of the parties being divorced and being, as they put it, "now again two ordinary young members of the community both earning good money" and "that the wife had more money to spend on herself after paying essential outgoings than the husband." They then went into an attempt to assess what, if anything, the wife had lost by this short and most unsatisfactory marriage, and whether any money should at this stage be paid by the husband to add to the wife's expendable income, as in no circumstances could she be described as being in want. I ought perhaps to add that one of the husband's weekly expenses was a voluntary allowance of £1 a week to his aged mother. The magistrates' conclusion is as follows:

"The magistrates decided that as this childless couple were divorced and each in receipt of good wages and in no want whatsoever, it would be inequitable to take money from the husband (and possibly thus from his aged mother) and give it to the former wife, and considered that this couple should be treated as two individuals who had made an unfortunate matrimonial attempt, but were now again just two members of the public in good employ and bore in mind many cases of a similar nature when they had to order allocations out of an income of £7 or £8 per week to maintain three or more children."

I am bound to say that I think that is a somewhat irrelevant introduction. Then finally they say:

"The magistrates bore in mind that if the wife's circumstances altered and deteriorated she could then apply again to the court. But that at present no order was justified or at the most a token allotment, which they felt was not justified for the above reasons."

I have already dealt with the fact that they arrived at a revocation on a complaint which asked for no more than a variation, and there, I think, they were wrong. Again I think they were wrong in their allusion to the divorce. It has been well settled for many years in this court by the decision in *Bragg v. Bragg* (1), which has been repeatedly followed here, and has been recently followed by the Court of Appeal in *Wood v. Wood* (2), that, though there has been a divorce, it is a matter of discretion whether to allow an order to stand or to discharge it. As all judges of this Division well know, and all practitioners well know, it is the commonest thing in the world in a divorce case, whether undefended or defended, to allow a maintenance order to stand whether or not it also includes an order for the custody and maintenance of children—none of which could be allowed if divorce *per se* was decisive to get rid of an order. It is very convenient that that should be so, for it has the merit of saving costs in the Divorce Court. The mere fact that these parties had been divorced is nothing but a discretionary ground, and although, no doubt, it may be important in connexion with the question of amount, it certainly does not necessarily lead to the conclusion that there must be a revocation.

(1) [1925] P. 20.

(2) 121 J.P. 302; [1957] 2 All E.R. 14; [1957] P. 254.

It is said, however, that the magistrates have not revoked the order at all; that all that they have done is, as it were, to suspend the money payments, and to leave them, in spite of the use of the word revocation, to be revived at any time under the terms of the Magistrates' Courts Act, 1952, s. 53, which reads as follows:

"Revocation, variation, etc., of orders for periodical payment.—Where a magistrates' court has made an order for periodical payment of money, the court may, by order on complaint, revoke, revive or vary the order."

I have already indicated that there are cases in which variation is proper. And there are cases in which, I think, reviver is proper; for instance, the case which I have mentioned in passing where an order ceases to be of effect because the parties have temporarily resumed cohabitation—the order still remains, but it ceases to have the effect of enforceability as regards amount. As to revocation, which, as I have already said, would be equivalent to a total discharge of the order ("discharge" being the word used in s. 7 of the Act of 1895) I do not resile at all from what I said in the passage which I quoted just now in *Trathan v. Trathan* (1), and I do not hesitate to add that in terms of s. 53 of the Act of 1952, reviver, like the other two things falls to be decided separately on whatever are the grounds of the appropriate complaint. I am not prepared, however, as at present advised, to assume that because of that section it is inapt to make an order for a nominal payment for the purpose of keeping an order alive, for which there is ample precedent in decisions of this court, reported or unreported. I can think of one which is reported, viz., *Starkie v. Starkie* (No. 2) (2), though it has no other relevance to this case than that we did make an order in that form in order to keep a wife's rights alive.

In my opinion, the whole of this argument turns on the decision in *Pratt v. Pratt* (3). That was a very remarkable case, and the substance of it was this. The wife's order had been revoked, or discharged, under s. 7 of the Act of 1895, because it was found that she had committed adultery, and it will be remembered that under s. 7 if she commits an act of adultery "such order shall on proof thereof be discharged." The provision is mandatory. There was no appeal against the discharge of the original order, but there was a divorce suit in which precisely the same issue of her alleged adultery came up for decision, and a judge of the High Court decided that she had not committed adultery. Thereupon, on the fresh evidence made available by the decision of the High Court judge, there was a complaint to restore or revive the original order. The simplest course (which has to my knowledge been adopted either on common-sense grounds or in oblivion of this decision in *Pratt v. Pratt* (3)) would have been to extend the time to appeal against the revocation by the magistrates and to deal with the thing then and there on that basis. Instead of which this court treated this decision of the High Court as being fresh evidence, as, of course, it was, and without more restored the original order.

On that foundation it is said that however definitely a court may discharge or revoke an order, it is open under this section for the wife to come back at any time and say "Now I want that order revived," of course, on fresh evidence to the satisfaction of the court. When it is necessary to decide that as being the only way in which the case may be decided, one way or the other, I shall have to face that issue. I say in passing, however, that we did, with obvious reluctance,

(1) 119 J.P. 451; [1955] 2 All E.R. 701.

(2) 118 J.P. 59; [1953] 2 All E.R. 1519.

(3) (1927), 96 L.J.P. 123.

follow *Pratt v. Pratt* (1) in *Markham v. Markham* (2). That was a case to which I have already alluded in passing, where the order ceased to have effect owing to a resumption of cohabitation, and with regard to that, at any rate, I feel no doubt that *reviver* is a proper term. However, we appear to have based our judgment on the authority of *Pratt v. Pratt* (1). Both cases are of respectable antiquity, and both were decided before the Magistrates' Courts Act, 1952, and the draftsmen, of course, as they always do, are taken to know all the law.

It is only right to say, however, that in *Re D. (an infant)* (3), which was a guardianship of infants case in the Court of Appeal, SIR RAYMOND EVERSHED, M.R., expressly refrained, because they were not cases under the Guardianship of Infants Acts, 1886 and 1925, from expressing any definite opinion about the validity of *Pratt v. Pratt* (1) or *Markham v. Markham* (2), and I say no more about it than that there may come a time when some court will have to decide what the law is about this matter, whether it is really true that an order which has been revoked can be revived without more than a mere complaint saying: "Now I want this order revived", when there has been no appeal against the revocation. I will add, as I must call attention to it, that during the adjournment of this case at mid-day we discovered that *Pratt v. Pratt* (1) had been referred to incidentally in another judgment of the Court of Appeal in *Thompson v. Thompson* (4). DENNING, L.J., referred to it for the purpose only of basing the proposition that

"where the previous proceedings were before the magistrates for maintenance, the court usually thinks it right to inquire into the matter afresh [that is on the question of estoppel per rem judicatam] in which case it allows the accused party to defend himself for the second time: see *Pratt v. Pratt* (1) and *Hudson v. Hudson* (5)."

There I leave it, and now return to where I began.

In spite of our criticism that the revocation was out of order because it was not based on a complaint, and in spite of the fact that the magistrates, I think, paid more attention than they should have done in the circumstances of this case to the fact that the parties had been divorced, and do not seem to have been referred by anybody to cases like *Bragg v. Bragg* (6) which point out exactly how the matter stands to enable magistrates to deal at their own discretion with that particular circumstance, I come back to what I think should have happened, for we are entitled to draw any inference which the court below should have drawn. It is particularly easy for us to do that in the present case because it happens to be an order which has been welcomed, with moderate enthusiasm at any rate, by both sides, and, also, it happens in effect to be what the magistrates themselves really wanted, and that is, to vary this order for £2 weekly by reducing it, as the complaint invited them to do, to a nominal order which will keep the matter alive, but not by reducing it to nothing by discharging or revoking it. That is plainly what the magistrates thought they were doing. I do not think that they achieved the purpose, but we can achieve that purpose by that particular variation of the original amount, and I propose that we should allow the appeal to that extent, while accepting the magistrates' findings about the figures.

(1) (1927), 96 L.J.P. 123.

(2) 111 J.P. 29; [1946] 2 All E.R. 737.

(3) 118 J.P. 25; [1953] 2 All E.R. 1318; sub nom. *Re Dankbars*, [1954] Ch. 98.

(4) [1957] 1 All E.R. 161; [1957] P. 19.

(5) [1948] 1 All E.R. 773; [1948] P. 292.

(6) [1925] P. 20.

WRANGHAM, J.: I agree. The case for the wife in this matter was put on two grounds: (i) that the magistrates had no jurisdiction to revoke their previous maintenance order because there was not in existence any complaint asking them to revoke it, and (ii) that the reasons which the magistrates have given show that they misunderstood the law, in that they thought that if the wife's circumstances altered and deteriorated she could then apply again to the court, despite the revocation of the order.

The question whether the magistrates were indeed in error in thinking that that was the law is, as LORD MERRIMAN, P., has indicated, a very difficult question, on which *Pratt v. Pratt* (1) is a directly relevant authority; and, as we are not deciding that question, I desire to say nothing whatever about it. On the other argument presented on behalf of the wife, the matter seems to me to be as plain as it could be. It is clear, first of all, that it results from the law laid down in *Trathan v. Trathan* (2) that an order revoking a previous maintenance order cannot be made unless there is a complaint applying for that revocation and not applying for something quite different; and, secondly, that the magistrates, despite the absence of such a complaint, did in fact revoke the order. In those circumstances it seems to me that what the magistrates did was done without jurisdiction, and I agree, therefore, with the consequence which my Lord has indicated.

LORD MERRIMAN, P.: The result will be that the appeal will be allowed by varying the order made by the magistrates on the husband's complaint by substituting for the revocation of the order an order that the original order be varied by the reduction from £2 a week to 1s. a month. So far we have dealt with the order made in favour of the husband, that is, the revocation order. We dismiss the wife's appeal against the dismissal of her complaint, and we will order that all the words after "it is hereby adjudged the said complaint is not true" be struck out and the words "and is hereby dismissed" be inserted.

Order accordingly.

Solicitors: *Kinch & Richardson*, for *T. A. Matthews & Co.*, Hereford; *Corner & Wadsworth*, Hereford.

G.F.L.B.

(1) (1927), 96 L.J.P. 123.

(2) 119 J.P. 451; [1955] 2 All E.R. 701.

COURT OF CRIMINAL APPEAL

(CASSELS, STREATFEILD AND SLADE, JJ.)

February 10, 1958

R. v. VACCARI

Criminal Law—Bankruptcy—Contributing to insolvency by gambling—Debt "contracted in the course of and for the purposes of . . . trade or business"—Debt to Inland Revenue—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 157 (1) (a).

Section 157 (1) of the Bankruptcy Act, 1914, provides: "Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business—(a) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or (b) he has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid. . ."

Unpaid income tax is a statutory liability and not a trade debt, and, accordingly, it does not come within the meaning of the words "debts contracted in the course of and for the purposes of . . . trade or business" within the meaning of s. 157 (1).

APPEAL against conviction and sentence.

The appellant was charged before the deputy chairman of the County of London Sessions, on Dec. 11, 1957, on an indictment containing three counts, the first two of which alleged against the appellant offences under s. 157 (1) of the Bankruptcy Act, 1914. The first count charged the appellant that, being adjudged a bankrupt, he materially contributed to or increased his insolvency by gambling within two years prior to the presentation of the bankruptcy petition, contrary to s. 157 (1) (a) of the Act of 1914, and the second count charged him, being adjudged a bankrupt, with having lost part of his estate by gambling between the date of the presentation of the bankruptcy petition and the date of the receiving order, contrary to s. 157 (1) (b) of the Act of 1914.

The appellant was engaged in business as a café proprietor from which business he made a large yearly profit. In 1950 the Inland Revenue presented him with a re-assessment of tax for the period 1944-49 amounting to £5,000. The appellant disputed the assessment. A further additional assessment to income tax was made on the appellant on Oct. 7, 1955, in the sum of £2,000. On Jan. 3, 1956, the Inland Revenue secured a judgment against him for the sum of £5,166 in respect of the re-assessment in 1950, and, the appellant being unable to pay it, the Inland Revenue, on July 27, 1956, presented a petition in bankruptcy against him. On Nov. 22, 1956, a receiving order was made against the appellant, and in January, 1957, a public examination in his bankruptcy was held. At his public examination, the appellant gave evidence that in the two years prior to the presentation of the bankruptcy petition he had lost some £3,000 by gambling and that in the period between the presentation of the petition and the making of the receiving order he had lost a further £2,000 by gambling. At the time when the appellant was adjudicated bankrupt he owed the Inland Revenue some £7,000. The appellant was convicted on all three counts in the indictment, and was sentenced to six months' imprisonment on counts one and two and three months' imprisonment on the third count which charged an offence of failing to keep proper books, contrary to s. 158 of the Act of 1914. All the sentences were ordered to run concurrently. He was granted a certificate under s. 3 (b) of

the Criminal Appeal Act, 1907. He now appealed against his conviction on counts one and two on the grounds that the deputy chairman was wrong in law in directing the jury that the Revenue debt amounting to £7,000 was a debt contracted in the course and for the purposes of the appellant's business within the meaning of s. 157 (1) of the Bankruptcy Act, 1914.

Durand for the appellant.

S. A. Morton and Whelan for the Crown.

CASELS, J., delivering the judgment of the court, stated the facts and continued: There was evidence for the consideration of the jury that the appellant had gambled and that, as the result of gambling during the material period, he had brought himself within the mischief of s. 157 (1) of the Bankruptcy Act, 1914, the words of which in this respect are of some importance. [His LORDSHIP read the relevant terms of s. 157 (1), and continued:] Within the four corners of that section, the appellant who, by his learned counsel has been described as possessing no merits at all, has gone ahead, first, because he has succeeded in losing to bookmakers who must have been very pleased to know that they would be paid no less a sum than £6,000, and, secondly, because he did not pay the Inland Revenue, but left them to obtain such judgments by such processes as they saw fit. The appellant was, therefore, prosecuted as coming within the mischief of s. 157 (1) of the Act of 1914, namely, that within two years prior to the presentation of the bankruptcy petition he had materially contributed to or increased the extent of his insolvency by gambling.

The whole case turned on the debt to the Inland Revenue, and the matter was decided as a question of law by the learned deputy chairman, that such a debt could be regarded as a debt contracted "in the course and for the purposes of such trade or business". The learned deputy chairman said that that was a point of law and left to the jury the fact whether the appellant had increased his insolvency by gambling, and on these two counts of the indictment the jury did not have much difficulty in arriving at the conclusion that the appellant had undoubtedly increased his insolvency by gambling because he had not paid certain people and he had not paid the Inland Revenue a debt which was due to them, a debt contracted in the course and for the purposes of such trade or business. This court has listened to the argument of counsel for the appellant, who has put everything before us which could possibly be put, and has even succeeded in finding that which he did not find at the trial, namely, some authorities on the point. These authorities have been cited, and learned counsel for the Crown finds that he is quite unable to support the conviction on these two counts or to argue that a debt due to the Inland Revenue by a man in business or a trader is a debt contracted in the course and for the purposes of such trade or business. This court has been concerned to find out—indeed it did not have much difficulty in so doing—what is the nature of the debt due to the Inland Revenue by way of income tax. Income tax is a share of the profit, and it is not a debt arising in the course of the trade or business, but it is the Crown's share of the profit after that has been ascertained. The authorities which have been cited to the court go to show that which was already known and very well established—that a trader cannot deduct from his profits the cost of having to pay damages to somebody who happens to have been injured by a faulty chimney on licensed premises. He cannot deduct the costs of bringing an action against the Board of Inland Revenue on a matter concerned with income tax. He cannot deduct the cost of unsuccessfully defending an action brought against him by the Board of Inland Revenue. In other words, income tax is not a debt arising in the course of or out of the trade or business. It is a

liability due directly to the Crown and it is calculated on the profits or gains in the course of the business but has nothing to do with the actual business in the way of a trade debt. It is not a trade debt. It is a statutory liability which has to be paid, and it therefore could not possibly be held to come within the four corners of the words of the Act of 1914, namely, a debt "contracted in the course and for the purposes of such trade or business".

It may seem very strange that a taxpayer who succeeds in delaying payment of his just dues to the tax collector and enjoys himself as much as he likes by gambling, yet should not come within the mischief of s. 157 (1) (a) of the Bankruptcy Act, 1914, when he is made bankrupt and it is found that his estate is considerably diminished by his activities in gambling. The only answer that this court can make is to say that that is not a matter for the court but for Parliament. We have to interpret the law and the Act of 1914 as we find it, and s. 157 (1) is applicable only to a debt which is contracted in the course and for the purposes of the trade or business on which a man has been engaged.

The position therefore is that the convictions on counts 1 and 2 must be quashed.

Convictions on counts 1 and 2 quashed.

Solicitors: *Hardcastle, Sanders & Armitage; Director of Public Prosecutions.*

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHED, M.R., PARKER AND SELLERS, L.JJ.)

February 17, 18, 19, 1958

FATSTOCK MARKETING CORPORATION, LTD., v. MORGAN

(VALUATION OFFICER)

Rates—De-rating—Industrial hereditament—Slaughterhouse—"Adapting for sale of any article"—Rating and Valuation (Apportionment) Act, 1928 (18 and 19 Geo. 5, c. 44), s. 3 (1).

By s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, it is provided: "the expression 'industrial hereditament' means a hereditament . . . occupied and used as a factory or workshop," and, further, that the expressions "factory" and "workshop" have respectively the same meaning as in the Factory and Workshop Acts, 1901 to 1920. Section 149 (1) (c) (iii) of the Act of 1901 includes as a factory any premises where manual labour is exercised by way of trade and used for the purpose of "adapting for sale any article." The hereditament in question was a slaughterhouse, and the tribunal held that the operations conducted there amounted to the adaptation of articles for sale, but decided that the factories legislation was not intended to apply to slaughterhouses which should be treated as exclusively governed by their own special code.

HELD: the slaughterhouse legislation from 1847 to 1954, although forming a code, did not exclude the application of the Factory and Workshop Act, 1901, and, therefore, the ratepayers were entitled to the de-rating privilege which they sought.

CASE STATED BY LANDS TRIBUNAL.

The appellants were the occupiers of a hereditament assessed in the valuation list for Aberdare Urban District as slaughterhouse, Ynys Road, Aberdare, at £180 gross value, £147 rateable value. They appealed to the Lands

Tribunal against a decision of a local valuation court of North Glamorgan Local Valuation Panel given on May 28, 1956, confirming the entry of the assessment in Part 1 of the valuation list. Their grounds of appeal were that the hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1) and that the assessment should be transferred to Part 2 of the list.

The hereditament comprised a stockyard for the reception of livestock, lairages for cattle, sheep and pigs, three slaughter bays, two hanging rooms adjoining the bays, a condemned meat room, a gut room, a skin room, a mess room, offices and stores. After pining in the lairage, the beasts were taken to a slaughter bay, where they were slaughtered and their horns, head and feet and hide or skin were removed, the body cavity was opened, the loose fat surrounding the stomach, the white offal, i.e., stomach and intestines, the glands and the red offal, i.e., lungs, liver, heart and windpipe, were removed and some trimming of the carcase took place. Pig's carcasses were put in scalding tubs and scraped by hand to remove hair. The carcase was then pushed into the hanging room and (in the case of cattle only) split into two sides by a mechanically operated saw. After cleaning and washing, the carcasses, together with the red offal and the white offal after further treatment remained in the hanging room till sale. Sides of beef were sub-divided into quarters for ease of handling before sale. If there was no demand for heads, they were boned out on the hereditament, the meat being sold to butchers or sausage makers and the bones to a bone crusher. The stomach was emptied of undigested food and partially digested food and swilled out and fat and trimming were removed. The intestines while still warm were taken to the gut room where fat was separated from them and they were stripped of their contents and prepared for further processing on or off the hereditament for beef casings. Pig's intestines were further cleaned and scraped in the skin room so as to convert them into sausage skins.

It was agreed by expert witnesses called on behalf of both parties that the whole of the processes carried out constituted normal good slaughterhouse procedure. They further agreed that, if a beast were merely killed and the further processes carried out on the hereditament did not immediately follow, the flesh would be unfit for human consumption. A dead cattle beast or carcase could realise £5 to £6 from a knacker and an estimated total of £67 10s. for carcase meat, etc., after the processes carried out on the hereditament.

The ratepayers contended that the primary purpose for which the hereditament was occupied was the adaptation of the carcase after the beast was killed for sale as meat for human consumption and the processing for sale of the various by-products. The valuation officer contended that the predominant user of the hereditament was slaughter which did not render the hereditament a factory, and that the preparing and adapting for sale of the carcasses was merely a secondary or consequential purpose of that use. He also contended that the whole of the legislation affecting slaughterhouses such as the Slaughter of Animals Act, 1933, the Food and Drugs Act, 1938, and the Slaughterhouses Act, 1954, showed that slaughterhouses were sui generis and fell outside the purview of the Factory and Workshop Acts.

The Lands Tribunal held that on the authorities there were two purposes of such a slaughterhouse and it was a question of fact which was primary. It found that the primary purpose of the occupation and use of the hereditament was to produce meat for human consumption and by-products for sale and that the actual killing was subsidiary to this main purpose. But it held that the whole process carried on on the hereditament was not an adaptation of an article

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for sale since the live beast which went in was not an article and the operations were not an adaptation of the dead beast for sale and the dead beast was not an article. It held further that the Factory and Workshop Act, 1901, did not apply to slaughterhouses. The hereditament was therefore not a factory or workshop and not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

Rowe, Q.C., and *Roots* for the ratepayers.

Squibb, Q.C., and *Scholefield* for the valuation officer.

LORD EVERSHED, M.R.: The question in this appeal is thus presented by the Case Stated: whether on the findings of fact the Lands Tribunal came to a correct decision in law in holding that the hereditament (the appellant ratepayers' slaughterhouse) is not a factory or workshop within the provisions of the Factory and Workshop Act, 1901. That is a correct posing of the true problem in the case; but this is a rating appeal and the question in the first instance is strictly whether under the Rating and Valuation (Apportionment) Act, 1928, the hereditament is an "industrial hereditament", an expression which by s. 3 (1) of that Act is defined as meaning a hereditament occupied and used, subject as thereafter provided, as a factory or workshop. There follow in the sub-section certain exceptions, including that contained in para. (f), where the hereditament is primarily occupied and used for

"any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. (2) of the same section it is provided that, subject as there stated, the words "factory" and "workshop" have respectively the same meanings as they have in the Factory and Workshop Acts, 1901 to 1920. So the matter comes back to the application of the Factory and Workshop Act, 1901, and it is thus a proper formulation of the problem before us to ask whether this hereditament is a factory or workshop within the provisions of the Act of 1901.

Elaborate definitions are provided by s. 149 of that Act. So far as relevant, the expressions "factory" and "workshop" mean premises wherein any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, including "the adapting for sale of any article". It was pointed out to us in argument that in the case of a factory there is the added condition stated in para. (c), relating to the use of power, but that condition does not apply in the case of a workshop. In the end, therefore, the question is whether the operations in the ratepayers' slaughterhouse are conducted for the purpose of adapting articles for sale.

Previously in s. 149 reference is made to a list of factories and workshops contained in Parts 1 and 2 of Sch. 6. The list enumerates many familiar instances, such as print works and earthenware works and the like, but it is clear that that list is by no means exhaustive. Thus, no instance of chemical works is included, well known though those must have been at the time, nor any reference to a brewery or a distillery.

I return to the problem, as I have now tried to distil it, of stating whether the operations of the slaughterhouse can be described as those of adapting for sale any article. To an ordinary reader of our language at first sight it would not easily appear so, for it might not be natural to regard the live animal or the dead carcase as an "article". Against that, however, the slaughtering of beasts, like many other things, is no doubt much more mechanised in the second half of the twentieth century than it was one hundred years ago, and, in so far as that is so, the safety and protection of workers for which the Factory

Acts were passed would not be unnaturally extended to cover the operations in a slaughterhouse. In any event, certain cases before the courts, which are not binding on us, seem to show that this first impression of the language is not one which has been adopted during the last generation.

Three cases decided in 1931 are reported in vol. 2 of English De-rating Appeals; *Revenue Officer for Surrey v. Clarkson*. *Revenue Officer for Rotherham v. Rotherham Co-operative Society, Ltd.* (1) and *Revenue Officer for Woolwich v. Royal Arsenal Co-operative Society, Ltd.* (2). In the first two cases the Divisional Court held that no case was made out for disturbing the conclusion of fact of quarter sessions or the recorder that the slaughterhouses there concerned were within the comprehension of the Factory Act legislation. LORD HEWART, C.J., said:

"In the second case the learned recorder has come to the conclusion that the hereditament should remain in the special list, and he has said: 'I am not satisfied that the slaughtering business is more important than the food factory business carried on in the said hereditament in that mere proof of floor space does not determine the primary purpose'. Again, I think upon the facts of that case he was entitled to arrive at the conclusion which we know."

The learned Lord Chief Justice then referred to a Scottish case (*Inland Revenue v. Edinburgh Assessor (Slaughterhouses Case)* (3)) and he concludes:

"No doubt these two cases are not quite the same, no two cases are, but I think they are the same in this vital respect: That the question was really a question of fact, and there were materials to support the conclusion at which in each case the court of quarter sessions arrived."

The third case emphasises the significance of the last sentence for quarter sessions had arrived at an opposite conclusion (*Revenue Officer for Woolwich v. Royal Arsenal Co-operative Society, Ltd.* (2)). AVORY, J. (who had participated in the earlier cases), indicated his doubt as to the soundness of the conclusion of fact, but he none the less felt no hesitation in agreeing that it was a conclusion of fact based on some evidence which the Divisional Court ought not to disturb. The not entirely satisfactory impression is left that cases which were apparently very alike in the end resulted in opposite conclusions; but, treating these cases as matters of fact, that may perhaps be an inevitable result.

A passage from the judgment of MACKINNON, J., in this last case was used in the argument and may illustrate some of that argument. He said:

"Premises in which sheep and oxen become mutton and beef, in other words, premises in which they are killed, are not an industrial hereditament. Premises in which beef and mutton are turned into joints, chops, and cutlets are an industrial hereditament. Premises where both those processes go on may or may not be an industrial hereditament. It depends whether the first or second is the primary purpose for which the whole premises are occupied and used."

It has been part of a strenuous argument put forward by the valuation officer that, on the facts in the present case, these are not premises in which beef and mutton are turned into joints, chops and cutlets, but a hereditament in which sheep and oxen become mutton and beef.

The Scottish case was decided in the Inner House of the Court of Session on appeal from the Lands Valuation Court (*Inland Revenue v. Edinburgh Assessor* (3)).

(1) (1931), 2 D.R.A. 53.

(2) (1931), 2 D.R.A. 282.

(3) 1930 S.C. 429.

The question before the court was whether the slaughterhouse, conducted by the corporation of the city of Edinburgh, was within the ambit of the factory legislation. The court had found in favour of the city of Edinburgh and against the Inland Revenue, and that view was sustained in the Inner House. LORD HUNTER said:

"The main argument presented by the appellant was that the primary use and occupation of the premises was to provide statutory facilities for slaughtering animals, and that they were therefore not entitled to be treated as industrial subjects . . . I think this argument was fallacious, and that, as the subjects were being mainly, if not entirely, used for purposes which were admittedly proper factory purposes, the committee were right in treating the subjects as industrial."

I emphasise the word "admittedly" in deference to the argument of counsel for the valuation officer. LORD SANDS was of the same opinion, although he concluded by expressing some doubt

" . . . whether the relief here given in any way subverts the economic purpose of the legislation."

LORD FLEMING at the end of his opinion used language which has been much quoted:

"The slaughter of animals, the dividing up of the carcasses, and the treatment of the by-products and residuals appear to me to be a process of altering or adapting for sale, and I therefore think that the committee were right in holding that the subjects were industrial lands and heritages."

I have referred to the admission mentioned by LORD HUNTER, because I do not forget the point made by counsel for the valuation officer that in the Scottish case, as in the Divisional Court cases, there were special features on which he relied as showing that they could none of them be taken as in all respects *pari materia* with the present case. I also draw attention to the fact that none of the cases are in strictness binding on this court; but they have stood apparently unchallenged for more than a quarter of a century. It seems to me, therefore, that two conclusions may be drawn from the cases for our guidance: first, that it is now too late to be shocked, so to speak, by the application to the processes with which we are here concerned of the phrase "adapting an article for sale"; and, secondly, that these questions should be treated, as they have been treated, *prima facie* at any rate as questions of degree and therefore of fact.

In its decision at p. 2, after describing the initial operations, including the killing and the separation from the main carcase of the offal, intestines and so forth, the tribunal states:

"While in the hanging room the meat [the main carcase] cools to atmospheric temperature and sets due to rigor mortis and this cooling and setting is necessary to get the meat into proper condition for human consumption. Prior to sale, which usually takes place the day following slaughter, the sides of beef are weighed and further sub-divided into quarters for ease of handling."

The decision then passes to a discussion of what happens to the component parts. This again I quote by way only of illustration:

"The intestines, while still warm, are taken to the gut room where the fat is separated from the intestines which are then stripped of their contents and prepared for further processing, either on or off the premises, for beef casings."

Finally, at the foot of p. 3, the tribunal says:

"It was agreed by the expert witnesses called on behalf of both [the ratepayers] and the [valuation officer] that the whole of the processes carried out on the premises constituted the normal good slaughterhouse procedure. It was further agreed by these witnesses that if a beast was merely killed and the further processes carried out on the premises did not immediately follow, the flesh would be unfit for human consumption."

That no doubt may be so; but I add that it does not seem to me to follow that the other operations are not processes nevertheless.

If I may say so, I think that Mr. Scholefield's attractive presentation of the case is perhaps an over-simplification of it; for, founding himself on certain of the passages which I have read, he says that all that occurs at this slaughterhouse is a particular kind of killing. There is, he submits, the killing of the knacker's yard, where the result is not intended for human consumption, or there is the killing in a slaughterhouse, which is a killing for butcher's meat; in either case all that is really done is a particular kind of killing, but killing of any kind is not an adaptation of an article for sale. I am not satisfied, however, that that is an adequate analysis. After all, killing is an incident, albeit one essential to the whole process which follows and one which indeed initiates all that does follow; but it is an incident none the less, a part only of all that goes on in the slaughterhouse. In other words, the question whether the whole series of operations, including the killing, amounts to an adaptation of an article for sale is (as I have said, guided by the cases that I have quoted) a matter of degree and of fact. So, as I think, the tribunal treated it, and rightly treated it; for at p. 6 it said:

"We have come to the conclusion upon the evidence before us that the primary purpose of the occupation and use of the premises is to produce meat for human consumption and by-products for sale and that the actual killing is subsidiary to this main purpose."

Without any desire to be critical, I should like to say a word about the use of the word "primary" in this sentence. Immediately before that sentence, the question had been posed thus:

"The question therefore which we have to consider is what is the primary purpose of this hereditament."

Now the word "primary" does not occur at all in s. 149 of the Factory and Workshop Act, 1901. There the language poses the question: Is the hereditament used for any of the following purposes, including the adaptation for sale of any article? In strictness, therefore, the first question for the tribunal to ask and answer is whether, looking at the whole of the process carried on, it can properly be said that the hereditament is being used for the purpose of adapting an article for sale. The word "primary" owes its significance and presence in these cases to the terms of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. It is there provided that, notwithstanding that the hereditament may have qualified for being an industrial hereditament by being a factory within s. 149 (1) of the Act of 1901, nevertheless for the purposes of the Act of 1928 it may after all be excluded if its "primary purpose" is not that of a factory or workshop. Other examples of exclusion include that where the primary purpose is that of a retail shop; and in that case no apparent conflict arises. Where the only question as to user is that of adaptation for sale or not, it may no doubt come to much the same thing; but I think that the real point here is not what the primary purpose was (which would be directly appropriate to the question of exclusion under the Act of 1928) but rather the more general question

Eng. Per.

of whether the purposes for which this hereditament was used were within the terms of the Act of 1901 and particularly the phrase "the adapting for sale of any article".

That possible criticism of the way in which the decision has been formulated does not affect what I take to be the conclusion, so far, of the tribunal, viz., that on the facts the operations conducted in this slaughterhouse, set out earlier in the decision, did qualify the hereditament as a factory or workshop within the meaning of s. 149 (1) of the Act of 1901. So far, then, the tribunal's decision was not adverse to the contention of the ratepayers. The tribunal went on, however, to say that, although it might properly be held that the purpose for which the hereditament was used was an adaptation for sale of an article (strained though the use of the language might thereby be), still the truth was that this slaughterhouse, and indeed any slaughterhouse, was an entity not comprehended in parliamentary intention within the Factory Act code at all; slaughterhouses should be treated, rather, as exclusively governed by what might be called the slaughterhouse special code of legislation. I have already referred to the point that slaughterhouses are not mentioned in Sch. 6, though it is conceded that that of itself is not by any means conclusive.

The point is stated at p. 7 of the decision by the tribunal as follows:

"Twenty years before the first Factory Act of 1867 [I think that perhaps the word 'first' might be omitted] slaughterhouses had been the subject of legislation in the Towns Improvement Clauses Act, 1847, and it is clear from the provisions of the Markets and Fairs Clauses Act of the same year that a slaughterhouse was the only place in which not only might cattle be slaughtered but also the carcase dressed for sale for human food. The legislation in regard to slaughterhouses deals specifically with them in a manner similar to that in which factories are regulated by the Factories Act, and it seems to us that Parliament, in passing the Factories Act, 1901, deliberately omitted slaughterhouses from the list of non-textile factories as being already regulated by other legislation."

It is no doubt true that the circumstance that the process being conducted on a particular hereditament may be properly described (whether the language be strained or not) as an adaptation of an article for sale is not necessarily conclusive of the question whether the hereditament is a factory or workshop, particularly if it appears that the general provisions of the Factories Act as a whole clearly are inapplicable to the circumstances under consideration. That was the effect of both *Nash v. Hollinshead* (1) and *Wood v. London County Council* (2), referred to earlier in the decision. In the former case an agricultural operation, carried on as part of normal farm work, and in the second case a kitchen, "providing for meals of operatives, were held to be outside the scope of the Factory Act legislation, because neither a farm nor the kitchen could be fitted at all into the general compass and expressed purpose of the Factory Acts. I am not satisfied, however, that the same can by any means be said of this case. Even if ninety years ago, i.e., in 1867, slaughterhouses did not so easily fit into the general scope and application of the Factory Act legislation of that year, it does not follow, as counsel for the ratepayers pointed out in his reply, that the same is true of a much more mechanised age or that the workers in a modern slaughterhouse may not naturally be the subject of Factory Act protection.

(1) 65 J.P. 357; [1901] 1 K.B. 700.

(2) 105 J.P. 299; [1941] 2 All E.R. 230; [1941] 2 K.B. 232.

Indeed, during the course of the argument, *SELLERS, L.J.*, referred to *Gledhill v. Liverpool Abattoir Utility Co., Ltd.* (1) which showed that in Liverpool when that case was decided it was readily admitted that an abattoir was within the Factory Acts so as to give to the workers therein the protection of that legislation.

I would, therefore, answer this point in this way. I would say that the slaughterhouse legislation is directed to a distinct and quite different purpose from that contemplated by the Factories Acts. It is directed to securing cleanliness for the benefit of the public, who will eat the meat eventually produced, and also to the diminution or elimination of cruelty to the animals which are slaughtered, so far as practicable. On the other hand, the Factory Acts are designed for a quite different purpose, viz., to give protection in cases where protection is properly required to persons working in what are called factories or workshops. It seems to me that, once that difference in aim is stated, it follows that there is no logical ground for saying that the purposes of one are exclusive of the purposes of the others.

As regards factory legislation, we were referred to the first of the Acts, 3 & 4 Will. 4 c. 103, known as the Shaftesbury Act, and the Acts which followed in 1840, 1850, 1853 and 1856. It is true that the factory legislation prior to 1867 was largely concerned with the employment of women and children in factories, and it was said by counsel for the valuation officer that it could have no sensible application to slaughterhouses in those days. I am unable to accept that. There is no material in fact before us, but it would not appear to me to be self-evident that provisions against the employment of women and young children were necessarily wholly inapposite in the case of slaughterhouses in the first half of the nineteenth century. The significance of the date 1867 and the Factory Act of that year is that it was in the legislation of that year that the phrase "adapting for sale of any article" first came into the legislative code. Thereafter the two streams of legislation go on. Prior to 1867, under the head of slaughterhouse legislation, there had been the Markets and Fairs Clauses Act, 1847, and the Towns Improvement Clauses Act, 1847, mentioned in the decision and directed to cleanliness and the absence of cruelty. Thereafter in 1933, 1938 and 1954 there were Acts for similar purposes relating to slaughterhouses. On the other side, in the other stream, so to speak, there came the Factory and Workshop Act, 1901, followed by the Act of 1920.

For the reasons stated, I am therefore unable to agree with the conclusion of the Lands Tribunal that the continuing stream of slaughterhouse legislation from 1847 to 1954, forming something of a code in itself, has the effect of excluding slaughterhouses from the scope of the Factory Act legislation. I do not find any good reason for saying that slaughterhouses were thereby not intended by Parliament to be covered by the latter legislation. I think that the Factory Acts are clearly capable of applying to slaughterhouses, certainly where the use of modern machinery makes it sensible that those working in them should have the protection of those Acts. If that is so, then the case is thrown back on the first question, viz., the question of fact whether the operations of this slaughterhouse did amount to an adapting of an article for sale within the meaning of the Factory Act legislation. On that matter of fact I have already said that I think the tribunal found in favour of the ratepayers and I see no ground for disturbing their conclusion.

The result must be, in my view, that this appeal must be allowed and that the tribunal should have found the ratepayers' hereditament entitled to the de-rating privilege which they sought.

PARKER, L.J.: I have come to the same conclusion. The first question is whether manual labour was employed in the ratepayers' hereditament for a factory purpose within s. 149 (1) of the Factory and Workshop Act, 1901, the relevant purpose being the adapting for sale of an article. The whole process carried out in the hereditament is undoubtedly the preparation of food for human consumption, but the question is whether any part of that process amounts to the adapting for sale of an article. Clearly, the actual killing is not, since a live animal is not, I think, an article. At the other end of the scale, there may be premises (not these premises) where the meat is in the end made, for instance, into sausages or pies, in which case there is clearly an adapting for sale of an article, if not the manufacture of an article. In between, as in the present case, a number of steps are taken in the preparation of the food, some to preserve the food, some to carve up the carcase and some to separate the products for sale to different purchasers.

I confess that, on a first consideration of the matter, it seems to me a straining of language to say that any of these steps amounted to an adapting for sale, but, having regard to the opinions expressed in the cases to which we have been referred—decisions which have stood for a long time—I am not prepared to differ. Indeed, I think that it can be put in this way. Most, if not all, of the steps taken after the actual killing amount to the dressing of the carcase for sale, a matter which on the facts of any particular case may be said to amount to an adapting for sale. The tribunal has clearly so found and there was evidence on which it could arrive at that conclusion.

The next question is whether, there being an activity here which was not a factory purpose, viz., the actual killing, it can be said that these premises were primarily used for a factory purpose. That must in every case be a matter of degree and accordingly a question of fact. As I read its decision, the tribunal has clearly found that the primary purpose here was a factory purpose. That being so, *prima facie* the hereditament was an industrial hereditament within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928.

The tribunal nevertheless held that a consideration of the activities carried on in the premises led to the conclusion that the Factory Act legislation was not applicable and reference was made to *Nash v. Hollinshead* (1) and *Wood v. London County Council* (2) to which my Lord also has referred. This contention was supported before us by counsel for the valuation officer by reference to the legislation dealing with factories and that dealing with slaughterhouses. He contended that at the time when the words "adapting for sale" were first introduced into the Factory Acts, in 1867, those Acts contained no provisions apt to apply to slaughterhouses, other than provisions dealing with what one may call sanitary arrangements which already appeared in the slaughterhouse legislation: for example, s. 128 of the Towns Improvement Clauses Act, 1847.

I am unable to accept this contention. For instance, it may well be that boys under eighteen or women were being employed at that time in slaughterhouses, in which case the Factory Acts then were certainly apt to cover slaughterhouses. At any rate, looked at today when mechanical saws, hoists and other machinery are used in slaughterhouses, I cannot think that the factory legislation is in any way inapplicable. The tribunal also referred to the fact that these premises were not registered under the Factory Act, and that slaughterhouses were omitted from the list of non-textile factories in the Act of 1901. Those considerations certainly are not conclusive and to my mind carry little weight.

For those reasons, and the reasons given by my Lord, I would allow this appeal.

(1) 65 J.P. 357; [1901] 1 K.B. 700.

(2) 105 J.P. 299; [1941] 2 All E.R. 230; [1941] 2 K.B. 232.

SELLERS, L.J.: I take the same view. This case takes one back to the legal battlefields of over a quarter of a century ago when, after the Rating and Valuation (Apportionment) Act, 1928, known as the De-Rating Act (although the actual benefit of de-rating was not, I think, given until the passing of s. 68 of the Local Government Act, 1929), there were many appeals giving rise to questions such as those which have been brought before us in this case, and in 1930 a large number of cases came before this court for consideration. In *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (1) SCRUTTON, L.J., in his judgment said:

"It must be borne in mind that if you exclude a hereditament from de-rating because there is no manufacturing process carried on in it, you are depriving the workmen of the protection of the Factory Acts, as well as the employer of the benefit of de-rating. It must also be borne in mind that in construing the Factory Acts, the courts have given a wide meaning to the words. When in *Law v. Graham* (2) the courts thought that mechanical bottle washing did not make a place a factory, the legislature the same year put bottle washing into Part 2 of sched VI, making it a factory, if power were used. Putting chocolates into a decorated box, in *Fullers, Ltd. v. Squire* (3) and arranging flowers on a metal cross or circle to make a wreath, in *Hoare v. Robert Green, Ltd.* (4) have been treated as 'adapting for sale' to protect the workpeople employed in that occupation."

I quote that passage, because, as my Lord has pointed out, in a recent case which came before the Court of Appeal, *Gledhill v. Liverpool Abattoir Utility Co., Ltd.* (5), Liverpool Corporation, who were the occupiers of an abattoir in Liverpool, had accepted the obligations of the Factory Acts, 1937 and 1948, accepting that those premises were within the Acts. As appears from the judgment of MORRIS, L.J., the Court of Appeal were informed that the application of the Factory Acts to the premises was not in dispute and the court proceeded to apply the regulations applicable to a factory. Of course, that is not conclusive, because the issue was not fought out and decided whether the premises were or were not within the Factory Acts. That case is not, I think, the first occasion when that very abattoir has been accepted in the courts as a factory and it is unlikely that an admission that the premises were subject to the onerous obligations of the Factory Acts would have been made unless a well-informed local authority had been satisfied that that was the case. It may be that the facts and circumstances existing at that abattoir are not precisely the same as those in the case before us, but I think the probabilities are that there also they carry out what has been referred to in this case as normal good slaughterhouse procedure but on a very much larger scale.

SCRUTTON, L.J. deals with this question of adaptation for sale. I do not propose to read it all, although it is all applicable to the issue which we have had to try in this case. He says:

"But in view of the fact that 'adapting for sale' is a separate head from altering, I see no reason for requiring alteration of substance to make 'adapting for sale'. If this were necessary, there would be no need to insert 'adapting for sale'. Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In

(1) 95 J.P. 64; [1931] A.C. 151.

(2) 65 J.P. 501; [1901] 2 K.B. 327.

(3) 65 J.P. 660; [1901] 2 K.B. 209.

(4) 71 J.P. 341; [1907] 2 K.B. 315.

(5) [1957] 3 All E.R. 117.

many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case."

On the facts which have been revealed here and, as I understand it, on the finding of the Lands Tribunal, the processes carried on in this slaughterhouse amount to an adapting for sale and would prima facie make these premises a factory and subject to the Factory Acts. But junior counsel for the valuation officer in particular, developing an argument advanced by his learned leader, stressed that that was a wrong view to take of the facts. He said that what happened after the killing was normal good slaughterhouse procedure and was to be treated as part of the slaughtering. That argument does not appeal to me. Once the killing is done that is final. Of course, the dead animal could be taken away; it could be burned or buried or, I suppose, it could be placed in a deep-freeze container and in that way preserved without decomposition setting in. So far, I would agree that that would be slaughtering and handling incidental thereto. What takes place on the premises here, after the killing, is done for the purposes of preservation and adaptation for food of the carcase of the beast which has just been killed. The acts done are in no way to complete the slaughter, but to make use of the beast after slaughter, and if what is done amounts to an adaptation for sale that particular requirement within the definition of "factory" is, as I see it, fulfilled. I think it has been so found.

The only remaining question is one on which I entirely agree with my Lords for the reasons that they have given. I can see no reason why the special legislation dealing with slaughterhouses cannot run concurrently with the legislation with regard to factories. I do not think that the slaughterhouse legislation is or has been in any way exclusive of the other. They deal with different matters. The slaughterhouse legislation deals with the animals and the products, and the factory legislation deals with the workmen carrying out the work and the processes involved in such an occupation. From another aspect, the slaughterhouse legislation deals with cleanliness and the prevention of cruelty and the Factory Act legislation deals with the safety and health of the work people. There may be matters in which there is some overlapping, such as ventilation, because good ventilation serves the purposes of both types of legislation. I think the appeal should succeed.

Appeal allowed.

Solicitors: *Richards, Butler & Co.; Solicitor of Inland Revenue.*

F.G.

COURT OF APPEAL

(LORD EVERSHERD, M.R., PARKER AND SELLERS, L.J.J.)

February 20, 21, 1958

W. COLLIER, LTD. v. FIELDING (VALUATION OFFICER).

Rates—Valuation—Plant and machinery—Automatic oven in bakery—Separate rateability of moveable parts—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927, No. 480), sched., class 4.

The ratepayers carried on a bakery business in which they used certain apparatus, known as "60 tray uniflow ovens." By a system of an endless belt to which 60 trays were attached, loaves could pass through the oven, having remained subjected to the oven's heat for a sufficient time to convert them into bread of the required consistency. The weight of an oven was 45 tons of which 9 tons were attributable to moving parts. The question for the court was whether the moveable parts were rateable by reason of the provisions of class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, which provided that certain plants or parts of plants were rateable, but "only to such extent as it is in the nature of a building or structure." The Lands Tribunal, after viewing the apparatus, decided that the moveable parts were not rateable. On appeal,

Held: the question whether the oven was as to all its mechanism in the nature of a structure, or whether part of it was structural and some part not, was a question of fact for the tribunal, and, as there was no misdirection, the court could not interfere.

CASE STATED BY Lands Tribunal.

The respondent ratepayers were the occupiers of a bakery, Duva Bakery, Leigh, assessed in the valuation list for the borough of Leigh at £446 net annual value, £111 rateable value from Apr. 1, 1954, and £696 net annual value, £174 rateable value from Jan. 1, 1955, under a decision of a local valuation court of South Lancashire Local Valuation Panel given on Dec. 13, 1955. They appealed to the Lands Tribunal against the decision on the ground: (i) that the assessments proposed by the valuation officer and adopted by the local valuation court wrongly included as rateable plant and machinery (a) trays, chains, sprocket wheels and shafts, driving wheels and shaft, gears, motors, fans, etc., used in connexion with baking ovens, (b) provers, including trays, chains, sprocket wheels and shafts, driving wheels and shaft, gears and motors, etc.; and (ii) that by reason thereof the assessment under appeal was excessive and ought to be reduced.

The two ovens were "sixty tray Uniflow ovens", marketed by Baker Perkins, Ltd. They were thirty-three feet, five inches long, twelve feet, four inches wide and nine feet, six inches high, and they each weighed forty-five tons of which nine tons was attributable to the moving parts. Each oven was put together on the site and consisted of mild steel sections bolted together and bolted to the concrete platform which formed the floor. To the sections were attached an inner casing of 3/16ths inch stainless steel sheeting and an outer casing of alloy with insulating material between. The two provers were (i) a ninety-four tray type, shaped like an inverted E, bolted to three channelled concrete bases. The overall length was twenty-four feet, three inches, the overall height, ten feet, six inches, and the overall width ten feet, three inches. The total weight was sixteen tons of which seven and a half tons was due to the moving parts. (ii) an eighty-four tray type of an inverted L shape, also bolted to a concrete base. Its overall length was twenty feet, ten inches, the overall height eleven feet, four inches and the projecting portion was seven feet, four inches above floor level. The weight was similar to that of the other prover. The provers were erected on the site with a framework of mild steel sections on to which the moving parts were fixed, and the whole was

covered with alloy sheet panelling to the sides and ends and fitted with a boarded top.

The mechanical equipment of both ovens and provers consisted of electric motors, shafting, etc., and chains to which were attached metal trays eight feet long. The equipment in the ovens was removable without removing the outer casing and was removed for cleaning and repairs, but to obtain access to the moving parts of the prover, panels of the outer covering had to be removed.

The purpose of the moving parts of the ovens was to carry the dough in tins placed on the moving trays at such a speed as would ensure that the time elapsing from the placing of the tins on the trays at the feeding entrance to their removal at the discharge exit was sufficient to ensure the correct cooking of the dough into loaves of bread. The purpose of the mechanical equipment of the provers was to provide an endless belt of trays to carry the dough, which had been cut to pieces of a uniform weight and placed in tins from the feeding entrance to the discharge exit at such a speed as would ensure that it remained in an atmosphere of a suitable fixed temperature and humidity for such a time as would enable the dough to rise or ferment fully so that it was ready for baking and to give a polish to the finished loaf.

The Lands Tribunal held (1 R.R.C. 246) that the static portions of the provers were rateable as chambers for conditioning which were structures or in the nature of structures within the Plant and Machinery (Valuation for Rating) Order, 1927, but it held that the motors were not rateable under class 1 (a) of the schedule to the order and that the moving parts of both ovens and provers were not rateable since they did not themselves form part of the structure of either oven or prover. The valuation officer appealed to the Court of Appeal, contending that: (i) the tribunal misdirected itself and was wrong in law in declining to hold that the whole of each oven including the moving parts and motors (or alternatively excluding the motors), was an oven and a building or structure or in the nature thereof and that the whole of each prover, including its moving parts and motors (or alternatively excluding the motors), was a chamber for conditioning and a building or structure or in the nature thereof within class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, and in holding that the moving part (and motors) were not rateable; (ii) there was no evidence to support the tribunal's finding that the moving parts did not form an essential feature of the oven as an oven or of the prover as a chamber for conditioning and that this finding was essential to the tribunal's decision.

Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

Rowe, Q.C., and *R. W. Leach* for the ratepayers.

LORD EVERSHED, M.R.: This case is concerned with certain apparatus in the bakery business of the respondent ratepayers, *W. Collier, Ltd.*, known respectively as provers and ovens. It will suffice for the purposes of this judgment if I confine myself in what follows to the ovens. The ovens are made by the well-known firm of *Baker Perkins, Ltd.* Their nature is set out carefully and fully in the decision of the Lands Tribunal, which says:

"The two ovens are identical and are marketed as 'Sixty tray Uniflow ovens'."

The name "Sixty tray Uniflow ovens" may perhaps give some clue to the mechanical nature of the contrivance in that, by a system of an endless belt to which trays are attached numbering sixty, loaves can pass through the oven, emerging at the end and having remained subjected to the oven's heat for a sufficient time to convert them into bread of the required consistency and other qualities.

The decision goes on to give the dimensions and weight of these contrivances. The weight is forty-five tons, of which about nine tons is attributable to the moving parts. The issue before us relates to what is there described as "the moving parts". The decision states that the ovens are put together on the site, and that they consist of mild steel sections which are bolted together on concrete platforms. Then occurs this paragraph:

"The mechanical equipment of each oven comprises five electric motors [which are then described] a working shaft with two sprocket wheels, an idle shaft with two sprocket wheels, four blocks and bearings carry sprocket shafts, two lengths of chain with slot guides connecting the working sprocket wheel to the idle one, a main drive chain from the driving motor to the working shaft, a tension sprocket to adjust the tension main chain drive, sixty metal trays eight feet long fastened to the chains, two oil heaters which pre-heat the oil supply, a time clock and a hand-operated winding handle."

As I am not mechanically minded, this description does not imprint in my mind any particularly clear picture of how this contrivance works or of what its moving parts consist of. But the tribunal had the immense advantage that it visited the hereditament and inspected the ovens and saw them in operation. The decision goes on:

"All the parts of this mechanical equipment are removable without removing the outer covering. The motors are easily removable and are all taken out for cleaning about every three months. The other parts are only removed when repairs or cleaning become necessary. The purpose of the moving parts of each oven is to carry the dough in tins placed on the moving trays at such a speed as will ensure that the time elapsing from the placing of the tins on the trays at the feeding entrance to their removal at the discharge exit is sufficient to ensure the correct cooking of the dough into loaves of bread. The ovens apart from their moving parts could not be removed without dismantling and they are intended to remain in their present situation until the time comes for them to be scrapped."

I understand the second part of this last sentence to refer to the ovens apart from their moving parts. The question which presented itself to the Lands Tribunal arises on class 4 in the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927. That order was formulated as a result of the deliberations of the committee envisaged in s. 24 of the Rating and Valuation Act, 1925. After an opening sentence which is of vital significance, class 4 consists of a long list or catalogue of apparatus or plant, beginning with acid concentrators and ending with windmills and wireless masts. Without referring to the actual terms of the statute, I think it well to remind oneself that the general scope of the legislation quoad industrial plant was that plant in general should not be rateable; but that general statement was made subject to the qualification that certain plant or parts of plant specified *inter alia* in class 4 of this schedule was to be rateable, but only to the extent (and I am anticipating the language itself) that the schedule so made it rateable.

The opening words of this class read:

"The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

In the appropriate alphabetical places in the catalogue are the words "ovens" and "chambers for conditioning or treatment", a phrase which admittedly covers the provers in the present case. The problem resolves itself into one of a

dual character. First, it is necessary to see whether the subject-matter sought to be rated can be identified with some item in the list. Secondly, the question is asked: To what extent is the item involved in the nature of a building or structure? It has been conceded by counsel for the valuation officer that those are the vital questions.

There is no doubt as regards the first part of the problem. Ovens are in the fifth item of the list: "Burners, forges, furnaces, kilns, ovens and stoves". Equally, among the list of chambers is found one appropriate to provers. Therefore, the real point in the case below, and equally here, is: To what extent are the ovens (and provers) with which we are concerned in the nature of a building or structure?

Counsel for the valuation officer has conceded that the motors, of which there are five in these ovens, are not parts of the ovens at all. Therefore, they are excluded from further consideration. It is not now disputed that the motors, as such, are not in the nature of structures, and it is therefore no part of the case before us that they ought to be a subject-matter of rating.

The question has been as to the moving parts, the nature and function of which have been described in the passage cited. Counsel for the valuation officer said with great force that one could not sensibly sever for any relevant purpose these moving parts from the oven as a whole. After all, the oven is described as a sixty tray Uniflow oven. Its purpose is to bake bread, and that is achieved by passing the dough in these trays through the ovens for that purpose. The mere fact that one can physically detach the trays and the apparatus to which the trays are clipped, says counsel, is quite irrelevant. They are an essential part of the oven and therefore the oven as a whole must be regarded as one item, all of it in the nature of a structure, as it is conceded that the framework bolted to the site is a structure.

But the conclusion of the Lands Tribunal was adverse to the valuation officer. I have felt considerable doubt and difficulty in this case, largely because it is not entirely clear to me what were the points which the tribunal put to itself on this question. The three vital paragraphs in the decision read:

"Upon [the] main contention [of counsel for the valuation officer] [counsel for the ratepayers] emphasised that under Part 4 of the schedule the material words were 'only to such extent as' and contended that the moving parts of both oven and prover were in effect nothing but conveyor belts within an oven and were not in themselves structures or in the nature of a structure."

I can indicate by reference to that paragraph at once the kind of difficulty which has presented itself. I think nobody will quarrel (certainly nobody in this case has quarrelled) with the validity of the first reference to the argument of counsel for the ratepayers:

"[Counsel for the ratepayers] emphasised that under Part 4 of the schedule the material words were 'only to such extent as'."

With that learned counsel before us on both sides have been firmly agreed throughout this appeal. But the contention is then attributed to counsel for the ratepayers that the moving parts were not merely nothing but conveyor belts, but were not in themselves structures, as though the view for which counsel contended was that the test to apply was whether these moving parts, in isolation and being detached, were themselves structures or in the nature of structures. I am quite sure that that was not counsel's contention in the court below, as it most clearly has not been his contention here. Restated, the question

is: Looking at this sixty tray Uniflow oven, is it, as to all the mechanism of which it is comprehended, in the nature of a structure; or is it only as to part of it structural by nature, but as to some part of the mechanism not structural? As I conceive it, that is a different question from that attributed to counsel for the ratepayers in the paragraph from the decision just read.

The decision goes on to refer to *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwins Iron & Steel Co., Ltd.* (1), and continues:

"But it seems to me that there is a distinction between a movable structure [as in the *Cardiff* case (1)] and movable plant which is used in conjunction with a structure. In the present case I am satisfied by the evidence that the oven could be used as an oven and the prover as a prover without the moving parts although it would not be economical so to use them since the dough would have to be stacked in and unstacked by hand and the whole benefit of the continuous process would be lost."

Then comes this pregnant sentence:

"But the moving parts do not form an essential feature of the oven as an oven or the prover as a chamber for conditioning, they are provided merely to ensure a continuous flow . . ."

With the utmost respect to the Lands Tribunal, it appears to me there to have misstated the essential point. The question is not so much whether the moving parts form an essential feature of the oven as an oven, but whether they form an essential feature of the oven as a structure. If the matter had rested where I have stopped in my reading, I should feel very doubtful, to say the least, whether the tribunal had posed to itself the proper question, but the learned tribunal continues as follows:

"and are, as [counsel for the ratepayers] put it, the furniture, and not integrated in the structure and become part of it."

Those last words seem to me essentially to be saying what I venture to suggest should have been said before. They appear to be a finding that these moving parts, being but furniture, are not part of the oven as a structure; I so interpret, and feel bound to interpret, the phrase "and not integrated in the structure". By that route, therefore, the conclusion is reached by the tribunal which is stated in these terms:

"I have, therefore, come to the decision that the moving parts of both ovens and provers are not rateable under the order, since the moving parts do not themselves appear to me to form part of the structure of either oven or prover."

Again, in that last sentence I sought to emphasise the vital words "form part of the structure".

If I have earlier correctly posed the problem which in these cases the Order of 1927 presents, I apprehend that, *prima facie* at any rate, it will be a question of degree and of fact whether in any given case one can properly say that the identified item of plant or part of plant is, as to the whole of it or as to some part less than the whole, in the nature of a structure. If it be a question of fact and if in determining it the tribunal has in no way misdirected itself, then the finding of fact will not be capable of challenge in this court.

Though I have felt the doubts which the language already read has put into my mind, and the force of the argument of counsel for the valuation officer, I have come to the conclusion that the tribunal did find as a fact that these moving

parts, though part of the oven and for any practical commercial purposes an essential part, were none the less not part of the structure of the oven and that the tribunal did not misdirect itself, in so far as it so found, nor did it direct itself to the wrong question.

In concluding that we could not disturb this finding, as I do on the whole, I have been somewhat influenced by considering what else this court ought to do or might do. I stated earlier that the tribunal had the great advantage of seeing this oven, and seeing it in operation. Perhaps I might be allowed to say here that I hope what I have said about the oven can fairly be applied to the case of the prover. My citations from the decision have been those relating or substantially relating to the oven, but I think that no distinction for present purposes arises between the two items of apparatus, nor indeed has counsel for the valuation officer sought to say that as to one apparatus rather than the other the decision should be impeached.

I repeat that the tribunal saw the apparatus. Reading the description of the moving parts will perhaps indicate little to a mechanically untutored mind. There might be a distinction between the moving trays eight feet long which are clipped in some way to the conveyor, on the one hand, and some of these shafts, which no doubt are part of the working attachment, on the other. It may well be that a tribunal of fact in this case, or in another similar case, considering what I have tried to emphasise as being the essential question, might come to a conclusion of fact different from that which the tribunal reached on this occasion. But, if I had been persuaded by counsel for the valuation officer that this decision was based on erroneous premises implicit in the language on which I have commented, I should have felt the greatest difficulty in concluding in a contrary sense that these moving parts or some of them were part of the oven regarded as a structure.

It would therefore seem that, if we were persuaded of the vice in this decision which counsel for the valuation officer has sought to demonstrate, we should have then to refer it back to the tribunal, directing it to reconsider the matter in the light of the questions which we think are the right questions and which I have attempted to formulate. I think that would perhaps make a great potter of this particular case. In future cases (and I hope I am not in this respect assuming more to myself than I ought) it may be that the formulation of the proper questions to be asked which we now make will assist in answering similar problems.

Reading this decision, and being well aware of the great care the learned tribunal takes in deciding these cases, I cannot believe that, if we sent the matter back, the tribunal would be likely to come to a substantially different conclusion from that expressed when applying its mind to the questions we have formulated. I hope that I am justified in that supposition. If I am, it comforts me in the conclusion which I have reached.

One other point was taken on which I should say something. It was said that, according to the extract from the shorthand note which I have, there was no evidence to support the view that the moving parts could be regarded as something distinct from the oven as a whole in any commercial or sensible use of the term. The extract is to be found with our papers and I will confine myself to reading one or two questions and answers from the cross-examination of Mr. John Ackland Hinks. In cross-examination counsel for the valuation officer said:

"Q.—Do you seriously suggest you could use these sixty tray Uniflow ovens in any way which is practical, if they had not these moving parts in them? A.—One would not just do it, but it could be done; that is the

answer . . . Q.—Speaking as a practical commercial matter dealing with these machines, would these provers work if they did not have the moving parts in them? A.—They would not work except that the conveyor belt . . . Q.—If you took the conveyor belt away it would cease to be a prover? A.—You would put the things in by hand, leave them there a period and take them out. Q.—You said that the oven as a matter of practical politics would not do it commercially? A.—I do not think so. Q.—With the prover you equally would not work it except with the moving parts in it? A.—I think so, except in an emergency.”

I agree that the evidence shows that, as a practical commercial matter, these moving parts were essentially a part of the mechanism of the oven and one would not find an oven described as a sixty tray Uniflow oven without having this belt and these trays attached to it, to justify that description and make it work in the way it was intended to work. But, though one may criticise certain sentences in the decision on the basis that it may have done less than justice to what Mr. Hinks said, the true view none the less is whether these things formed part of the oven as a structure, not whether they formed part of the oven as an oven. I find nothing in this evidence to disable the conclusion, which I think was in the end the deliberate conclusion of the tribunal, that these moving parts were sufficiently severable and distinct to make it sensible to conclude as a fact that, if and so far as they were part of the oven and an essential part of it as a working piece of apparatus, nevertheless they were not part of it as a structure. On the whole, therefore, and for the reasons which I have tried to state, I would dismiss this appeal.

PARKER, L.J.: I have not found this at all an easy case, involving as it does the interpretation and application of the words “only to such extent as”, which appear in class 4 of the Order of 1927. I think it is clear that in order to make the whole of a piece of plant set out in that class rateable, it is not sufficient that a part of it should be, or be in the nature of, a building or structure. It is clear from the words “only to such extent as” that it is possible that there will be cases where part of the plant in question will not be rateable, though the rest of the plant will.

Accordingly, it seems to me that the approach in any case must be along these lines. First, is the entity in question one of the specified pieces of plant and machinery in the order? If the answer is yes, looked at generally can it be said that it is, or is in the nature of, a building or structure? Finally, on a second look, is it clear that the whole of it is of that nature? Put in another way, is there any extent to which it is not?

Quite clearly, that does not involve looking at each component part of the plant in question in isolation. If one, as it were, dismembered the plant into its components and looked at each component, no part of it would be a structure at all. It clearly does not mean that. It seems to me, however, that, if one finds an accessory, a piece of equipment, a component, which is not itself a structure and which is not built into that part of the plant which is undoubtedly a structure, then there would be grounds for excluding it under these words and that part would not be rateable. Looked at in that way, it seems clear from the findings of the tribunal that the moving parts in this structure would not be rateable. In one paragraph the tribunal said that the moving parts were “the furniture, and not integrated in the structure and become part of it”, and in another paragraph that they did not appear to form part of the structure. On the face of it, therefore, that finding, which is clearly a finding of fact, is one with which we could not interfere.

Counsel for the valuation officer has stressed very forcibly that that conclusion is arrived at following a finding that these moving parts were not an essential part of the oven, and he points out that on the evidence that is clearly wrong: in any commercial sense they are essentially part of the oven. Nevertheless, for the reasons given by my Lord, I do not think that any useful purpose would be served by remitting the case back to the tribunal. I think that there is a clear finding in this case that no part of these moving parts formed part of the structure, and accordingly I would dismiss the appeal.

SELLERS, L.J.: I have come to the same conclusion, and I do not think that I can add anything affirmatively to assist in the reasoning given by both my Lords.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Godden, Holme & Co.*

F.G.

COURT OF APPEAL

(LORD EVERSHERD, M.R., PARKER AND SELLERS, L.JJ.)

February 19, 20, 21, 1958.

SHELL-MEX AND B.P., LTD. v. HOLYOAK (VALUATION OFFICER)

Rates—Valuation—Plant and machinery—Underground petrol tank of petrol station—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927, No. 480), sched., class 4.

The hereditament was an underground petrol tank under the petrol pumps of a petrol station. It consisted of a metal container of a capacity of 3,000 gallons resting on a concrete base with side walls of brickwork, the space between the walls and the container being filled with dry sand. Tanks were "plant" enumerated in class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927. The Lands Tribunal decided that the tank did not form part of the hereditament. On appeal,

HELD: the tank was not a piece of plant put into a building for convenience, but the housing formed an essential part of the plant, and, therefore, the whole plant was rateable.

CASE STATED by Lands Tribunal.

The respondent ratepayers appealed to the Lands Tribunal against a decision of a local valuation court of Warwickshire Local Valuation Panel given on Feb. 21, 1956, directing that the assessment of a hereditament known as Oaklands Filling Station, Birmingham Road, Budbrooke, in the valuation list for Warwick rural district should be increased from £25 gross value, £18 rateable value, to £80 gross value, £64 rateable value. The grounds of appeal were that the assessment was incorrect and excessive by reason of the inclusion therein of the value of certain plant or machinery, petrol storage tanks, contrary to s. 24 (1) of the Rating and Valuation Act, 1925. The Lands Tribunal held (Nov. 5, 1956, reported 1 R.R.C. 148) that the only part of the installation comprising the underground petrol tank (a metal cylinder) and the brick and concrete compartment housing it which could properly be described as a "tank" for the purposes of the Plant and Machinery (Valuation for Rating) Order, 1927, schedule, class 4, was the metal cylinder or tank itself, since the compartment did not form a functional entity with the tank; and as the tank was admittedly not a building or structure or in the nature of a building or structure looked at by itself it could not be deemed to be a part of the hereditament for rating

purposes under the order and the Act. The valuation officer appealed by way of Case Stated to the Court of Appeal. He contended (i) that the tribunal misdirected itself and was wrong in law in holding that the only parts of the underground installation which could properly be described as tanks for the purposes of the order were the metal cylinders; (ii) that, although, looked at by themselves, the metal cylinders were not buildings or structures or in the nature of buildings or structures, each cylinder as installed on the hereditament was, or was in the nature of a building or structure; and (iii) that on the true construction of the Act and of the order the whole of the underground installation was deemed to be part of the hereditament and was rateable and that the tribunal was wrong in law in holding otherwise.

Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

Rowe, Q.C., and *Roots* for the ratepayers.

LORD EVERSHERD, M.R.: The question raised in this appeal relates to the liability for rating of an underground petrol container (to use for the moment a neutral phrase) which underlies the petrol pumps of a petrol station of the kind with which we are all no doubt familiar. By the Petroleum (Consolidation) Act, 1928, Parliament has in some degree sought to regulate the keeping in bulk of petroleum spirit. So far as is relevant to the present case, the requirements applicable to the respondent ratepayers are those provided in licences issued by the relevant local authority. We have before us a copy of the licence. The conditions at the back of the licence are numerous and involve the construction of elaborate means designed to protect persons and property in the immediate neighbourhood from the risks of leakage and explosion. Thus, to take one or two illustrations, No. 1 in the schedule of conditions reads:

"The petroleum spirit tank together with the connexions, pipes and fittings shall be so constructed and maintained as to prevent any leakage of petroleum spirit."

No. 4 provides:

"The filling and dipping pipes shall be carried down to within two inches of the bottom of the tank."

I think it more helpful in the present case to consider the actual construction with which we are concerned; for the question is whether that which now exists underground at the ratepayers' petrol station is or is not liable to be rated as to the whole or any part. That construction is well illustrated by a plan which we have before us and which is described as "Details of petrol storage tanks", the details so illustrated being those in fact required by the local authority at or near Birmingham.

I can best describe the resulting construction in this way. There is first made in the ground at the required depth a concrete base and the thickness of it is such as this plan requires and indicates. Then there are side walls of nine-inch brickwork from the base to the surface, such that the brickwork has a three-quarter inch cement rendering to line it. On the base are concrete rests or cradles, and on those rests is placed the actual metal cylinder which contains three thousand gallons, or is capable of containing three thousand gallons, of petroleum spirit. The dimensions of that container are thirteen feet six inches in length by seven feet in diameter. The space round the outside of the cylinder and between it and the walls is filled, again in accordance with requirements, by what is described as being "well consolidated sweet dry sand". In the plan the space which has been created by the base and walls is called a chamber. The cylinder has at the top of it a means whereby it is filled with petroleum and

from which, on the other hand, petroleum can be extracted for supply to customers. This means is provided on the surface of the earth by a manhole, but save for that manhole above the cylinder and between it and the surface of the earth are placed slabs of reinforced concrete to a considerable thickness.

This description shows that the three thousand gallon cylinder is encased in a construction of concrete, brick and sand, etc., tightly encased and embedded in the ground, the whole thing being designed for the protection of persons and property, so that, if there should be leaks or explosions, the effect will be taken by the earth and the surround and it will not do damage outside. That being the construction in accordance with the local authority requirements, the question then is: How much of it, if any, should be rated? As I understand it, counsel for the ratepayers conceded that the cradle, the walls and the base as such would be buildings on or in the hereditament and liable as such to be rated without any reference to the Plant and Machinery (Valuation for Rating) Order, 1927, which we discussed in the judgment in *W. Collier, Ltd. v. Fielding* (1). But that is not the end of the matter; for it has been the claim of the valuation officer to rate the whole of the structure as a single unit as constituting a "tank", a word which hitherto I have been careful to avoid.

The opening words of class 4 of the order provide:

"The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

In the catalogue appears the word "tanks", and that is the only item in the catalogue with which this construction or the cylinder inside it can be identified. There has been no attempt to say that the construction as a whole can be identified with some other item in the list, e.g., as one of the chambers for any of the purposes there described. We are concerned with the item "tanks" in the list and with the question accordingly: what constitutes for present purposes "the tank"? and, when that question has been answered, is it as to the whole, or to the extent of any part of it, in the nature of a structure?

It was the view of the Lands Tribunal that the tank was limited to the cylindrical object inside the concrete, brick and sand structure which I have described. Further, it was said that that tank was not in itself in the nature of a structure: it was a movable piece of apparatus, large no doubt, but not so large as to be other than an ordinary piece of movable plant.

On the other side, for the valuation officer it was said that that is not a correct way to look at this contrivance. Counsel said that the ratepayers were storing petrol in a tank which consisted of base, walls and side packing and of which the metal cylinder was merely the containing lining or skin. The valuation officer submits that, on such a view of the matter, the whole thing, cylinder and all, is not only a tank but in the nature of a structure. As I have understood the argument, if that view is right, it is not in doubt that the whole thing is rateable. It has not been suggested that, treating the whole construction as a tank, it is a structure or in the nature of a structure as to less than one hundred per cent. of it. It is not suggested, e.g., that the metal cylinder could be treated as a detachable part and therefore not itself part of the tank as a structure. That is perhaps natural enough, because it would be quite impossible to extract the tank by any means whatever other than by demolition of the whole thing, walls, sand, concrete and everything.

In my judgment in *W. Collier, Ltd. v. Fielding* (1) I said that whether and to what extent an identifiable piece of apparatus was in the nature of a structure

was *prima facie* a matter of degree and of fact. So also, I apprehend, it will be *prima facie* a matter of fact to say what constitutes the thing to be identified with the item in the catalogue in any case. Therefore, if, after examining the material and perhaps the site, the tribunal had merely said, "I conclude that the tank here is no more than the cylinder", that might well have been the end of the matter, but the tribunal has not so confined itself. Finding this case difficult, I have come to the conclusion that the tribunal materially misdirected itself and therefore I think on the whole that the decision ought not to stand.

Having described the way in which this underground containing apparatus was put together, the tribunal referred to *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwins Iron & Steel Co., Ltd.* (1), and to the formula there used by JENKINS, J., a "functional entity", and continued:

"I have come to the conclusion that the only part of the installation which can properly be described as a 'tank' for the purposes of the order is the metal cylinder."

If the tribunal had stopped there, it might have been the end of the matter, but it continued:

"It seems to be clear that the licence deals solely with this cylinder as a 'tank' in which the petroleum spirit is to be stored."

I must explain what I understand that to mean. It may well be that the two conditions which I read and others like them, when they mentioned the tank, were referring to the metal cylinder or the lining; e.g., when condition No. 4 spoke of the dipping pipes going to within two inches of the bottom, that must have referred to the bottom of the cylinder, the lining. Further, the drawings mark and show the tank by that name, as distinct from the walls, elsewhere called a chamber; though the whole thing (lining, base, cradle and everything) is described in the title to the drawing as "Details of petrol storage tanks."

The decision continued:

"The licence requires this tank to be below ground and requires a plan of the layout of the premises to be deposited and adhered to in order to ensure that the tank is so placed as to reduce to a minimum the risk of fire or explosion. But it seems to me that the compartment in which the tank is housed does not form a *functional entity* with the tank any more than any other building in which a piece of plant or machinery is housed. That compartment appears to me to form an integral part of the hereditament like any other building thereon but the metal tank which is admittedly not a building or structure or in the nature of a building or structure looked at by itself should not under s. 24 and the order be deemed to be a part of the hereditament."

I emphasised in reading the two words "functional entity", which are no doubt extracted from the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwins Iron & Steel Co., Ltd.* (1). With all respect, I cannot help thinking that the tribunal may have been somewhat diverted by that phrase. It depends on what function one has in mind, but I should doubt whether it could be said in this case that the compartment with the concrete and the sand filling was not "a functional entity" with the container, since the whole object of the installation was that the petrol should

(1) 113 J.P. 78; [1949] 1 All E.R. 37; [1949] 1 K.B. 404.

Eng. Per.

be so contained as to minimise to the greatest possible extent the risks and consequences of fire and explosion. With all respect, it seems to me that the fallacy lies in this sentence:

"But it seems to me that the compartment in which the tank is housed does not form a functional entity with the tank any more than any other building in which a piece of plant or machinery is housed."

I have been unable to escape from the conclusion that in the end the tribunal came to the view that what it called "the compartment", the installation other than the cylinder, was no more relevant to the question of the rating of the cylinder in this case than would be an ordinary above ground edifice in which a cylinder, a tank, happened to be found, resting on a cradle. In my judgment, quite manifestly that is not so. To translate this installation to an above ground equivalent, one would not simply place the metal cylinder on a cradle in a building. One would have to create a structure with outer walls, concrete, sand filling, etc., of which the cylinder would be nothing more than the convenient lining. One would require to produce a much more solid piece of apparatus, designed and required to protect the outside world in the form of human beings and material from the risk of leakage and explosion.

The conclusion, therefore, that the tank for the purposes of the order is confined to the metal cylinder rests on the ground stated, that in the view of the tribunal the housing, what the tribunal calls "the compartment", is no more relevant to the cylinder than would be the surrounding building in the ordinary case of a cylinder found on cradles in such a building above ground. I think that that reasoning disables the conclusion, and I would therefore in this case allow the appeal and say that the tank in the ratepayers' hereditament is the installation in its entirety. I have already said that, if that view is right, there is no question that it is not as to the whole of it of the nature of a structure.

PARKER, L.J.: I agree, and I would only add this. As it seems to me, the question is what in relation to the hereditament is the nature of the underground structure, using that word in a neutral sense. It is perfectly true that, in relation to the licence and the local authority plans, the only part which is described as a tank is the metal container and that the surrounding walls are treated as a chamber. The question is, however, what is properly described as "the tank", in relation to the hereditament, not in relation to the licence. Looking at the primary facts found by the Lands Tribunal, the only reasonable conclusion is that the whole structure, walls and metal lining, itself forms the tank. After all, the purpose is the storage of petrol. The brick and concrete structure without the lining performs no function at all. Equally, the lining without the walls and concrete performs no sensible function, quite apart from any question of legality. I say "no sensible function", because this is not merely a case of some added safety precaution, but a question of storing a highly dangerous and inflammable liquid which, quite apart from legality, cannot in any sensible sense be stored without very careful precautions. In other words, this is a long way away from a piece of machinery or plant put into a building for convenience. It is a case where the so-called chamber is a housing which forms part of the plant itself.

For these reasons, and those given by my Lord I would allow this appeal.

SELLERS, L.J.: The significant matter is that these tanks are for the storage of petrol, as my Lord has just indicated. The matter has so to be viewed. The mere cylinder would be quite insufficient for that purpose having

regard to the liabilities of the occupiers, who are the respondents. It would not be sufficient to have the petrol simply in the cylinder. It has to be dealt with in some manner similar to that in which it is dealt with here for the purposes of safety and proper user. The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up. What has been called the structure or building and the cylinder form one tank for the purpose of storage of petrol and it should be so regarded. In my view, there is an error of law in the conclusion at which the Lands Tribunal arrived: see *Edwards v. Bairstow* (1). I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Sydney Morse & Co.*

F.G.

(1) [1955] 3 All E.R. 48; [1956] A.C. 14.

LEICESTER ASSIZES

(PAULL, J.)

January 31, 1958

R. v. POTTER AND ANOTHER

Criminal Law—False pretences—Procuring delivery of chattel with intent to defraud—Impersonation at driving test to obtain driving certificate to enable another person to obtain driving licence—Forgery—Signature on driving certificate—Signature in driving examiner's journal—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 32 (1)—Forgery Act, 1913 (3 & 4 Geo. 5 c. 27), s. 4 (1), s. 6.

The defendants, W. and A., were brothers. W. was a qualified driver of motor vehicles and A. had only a provisional licence. A. having made an appointment to take a driving test on July 15, 1957, it was agreed between them that W. should take the test in A.'s place. On July 15 W. presented himself for the test, throughout the test impersonated A., and handed to A. the certificate of competence in which the examiner certified that A. had passed the driving test. On Sept. 11, 1957, A. was issued with a driving licence on presenting a completed application form together with the certificate and the fee.

HELD: (i) W. procured a chattel (viz., the driving certificate) to be delivered to him for the use or benefit of himself within s. 32 (1) of the Larceny Act, 1916, since he desired the certificate in order to hand it over to his brother, and he did so with intent to defraud since, although nothing of value was obtained by the deceit which was practised, he intended to use the document to induce the county council to take a course of action which they would not otherwise take and which it was their duty not to take if they had known all the facts, and also to hand to A. a piece of paper (i.e., a driving licence).

(ii) A. was an accessory before the fact of that offence and so could be charged as a principal.

(iii) similar considerations applied to charges of procuring the driving licence, contrary to s. 32 (1).

(iv) W. having, at the conclusion of the test, signed the driving examiner's journal and the driving certificate, could be properly charged with the forgery of a document under s. 4 (1) of the Forgery Act, 1913, and A., having presented the certificate when he applied for a driving licence, with uttering it under s. 6 of the Act of 1913.

TRIAL on Indictment.

The defendants, Alan Frederick Potter and William Potter, were charged on an indictment containing six counts. The first three counts were against both

defendants; the fourth and fifth counts were against William only, and the sixth count was against Alan only. The counts were as follows: 1. That both defendants on a day unknown between July 1 and July 15, 1957, conspired together to procure the issue to William in the name of Alan of a certificate of competence to drive certain groups of motor vehicles by means of William impersonating Alan during the test of competence held under the provisions of the Road Traffic Act, 1934. 2. That both defendants, on July 15, 1957 (the date on which the test took place), by falsely pretending that William was Alan with intent to defraud, procured to be delivered to William for the use of Alan a certificate certifying that Alan had been examined and had passed a test of competence to drive the said motor vehicles that were prescribed under the Road Traffic Acts, 1930 to 1934. 3. That both defendants on Sept. 11, 1957, by falsely pretending that a certificate certifying that Alan had been examined and had passed the test to drive motor vehicles was a valid certificate and properly issued to Alan with intent to defraud, procured to be delivered to Alan for his use and benefit a licence licensing him to drive certain motor vehicles. 4. That William on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely, a driving examiner's journal, purporting to contain the signature of Alan. 5. That William on July 15, 1957, with intent to defraud, forged an entry in a certain document, namely, a certificate of competence to drive, purporting to contain the signature of Alan. 6. That Alan on Sept. 11, 1957, uttered a certain document, namely, a certificate of competence to drive, purporting to contain the signature of Alan, knowing such document to be forged and with intent to defraud. Under s. 35 of the Larceny Act, 1916, Alan was charged as a principal on count 2 and William as a principal on count 3.

The following facts were stated in the depositions and were not in dispute. The defendants were brothers. William, who was twenty-three years old, was a qualified driver. Alan, who was twenty years old, held only a provisional driving licence and made an appointment for a driving test to be held on July 15, 1957. At a meeting between the defendants on July 14 they agreed that William should take Alan's place in the test, and Alan handed to William his appointment card. On July 15 William presented himself to the driving examiner, produced the appointment card and said that he was Alan. On being asked to sign the examining driver's journal, he did so in the name of Alan. After William had taken and passed the test, the examiner wrote out a certificate, which was in a statutory form, certifying that Alan had been examined and had passed the test of competence to drive. Before handing the certificate to William, the examiner asked William to sign it. William signed the certificate in the name of Alan, and after receiving the certificate he met Alan and handed the certificate to him. On Sept. 11, 1957, Alan went to the motor taxation office in Leicester, presented an application for a licence to drive, together with the driving certificate and the fee of £1, and received a licence to drive vehicles of a certain group.

Both defendants pleaded Guilty to count 1. They both pleaded Not Guilty to counts 2 and 3; William pleaded Not Guilty to counts 4 and 5; and Alan pleaded Not Guilty to count 6. After the pleas had been made, HIS LORDSHIP (PAULL, J.) drew the attention of counsel to the fact that, for the purposes of sentences, it was sufficient to accept the plea of Guilty on count 1. The prosecution, however, were very anxious to obtain a decision whether counts 2, 3, 4, 5 and 6 were good in law. It was submitted by the defence, that, admitting the facts, these counts did not lie. The points of law were raised by the defence before the jury were sworn, and it was agreed by counsel that, if the points of law were decided in favour of the defence, the prosecution would withdraw counts

2 to 6, and that, if they were decided against the defendants, counsel for the defence could accept the findings of law and advise the defendants to plead Guilty, or, if the defendants desired to contest the matter, they would be at liberty to have the case tried by a jury. Both defendants accepted the facts stated in the depositions as being in evidence in the case.

Grieves for the Crown.

Mallison for the defendant Alan Frederick Potter.

A. J. H. Morrison for the defendant William Potter.

PAULL, J., after stating the charges against the defendants, their pleas to the counts, and the facts which appeared in the depositions and were admitted, continued: It, therefore, falls to me now to decide the points of law raised, and I shall do that by taking each of the counts, other than count 1 to which the defendants pleaded Guilty, and I shall consider the points which have been raised before me in regard to each count.

In count 2 the statement of offence is procuring a certificate by false pretences, contrary to s. 32 (1) of the Larceny Act, 1916. Section 32 reads:

"Every person who by any false pretence—(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of [an offence]."

Counsel for the defence submitted that, before a person could be convicted under s. 32 (1), it was necessary for him to obtain the chattel, money or valuable security. Counsel referred me to *R. v. Kilham* (1), in which it was held that the word "obtain" did not cover the case if all that the prisoner did was to obtain the loan of property. Counsel for the prosecution, however, pointed out to me that the second half of s. 32 (1) makes the offence proved if the prisoner "procures . . . any chattel . . . to be delivered to [him] . . . for the use or benefit . . . of himself . . ." He also pointed out that in *R. v. Chapman* (2) it was held that a person could be indicted for obtaining a railway ticket by false pretences, although normally the railway ticket would be returned to the railway company at the end of the journey. I do not think that the point raised by counsel for the defendants is a good one. To begin with, in so far as it is for me to draw any inference of fact, I should say that the only inference of fact which could be drawn from the fact that the examiner handed over the certificate to William Potter on July 15 was that at that moment William Potter could do what he pleased with the certificate. If he desired to obtain a driving licence, he had to present the certificate to the authorities before they would issue a licence; but, as I see it, there would be nothing against William Potter, having obtained that certificate, putting it on the fire. True, he would not have got his driving licence, but circumstances may alter, and he might have changed his mind. I am, however, quite satisfied that, whether that inference of fact be true or not, this case comes within the Larceny Act, 1916, s. 32, because William Potter procured a chattel to be delivered to him—the chattel being the piece of paper on which appeared these words: "Mr. Alan Frederick Potter has been examined and has passed the test of competence to drive Group A"—and he obtained it for the use of benefit of himself in the sense that he desired that piece of paper in order to hand it over to his brother. Indeed, the section says "... for the use

(1) (1870), 34 J.P. 533; L.R. 1 C.C.R. 261.

(2) (1910), 74 J.P. 360.

or benefit . . . of himself or any other person". William Potter well knew when he obtained that certificate that the intention of Alan Potter was to use it as though it were a certificate obtained by Alan. I hold that the point taken by the defence fails.

The second point taken by the defence is this. Counsel submitted that it could not be said that there was an intent to defraud—that there was no intent to defraud because nothing of any value was obtained by the deceit which was practised and nothing was done which turned the deceit into an intent to defraud. I am content so far as that is concerned to rely on the words of SWIFT, J., in *R. v. Bassey* (1). In that case the appellant, a man called Bassey, had induced the Benchers of the Inner Temple to admit him as a student by furnishing the treasury office with forged documents, and the point was taken that the words "intent to defraud" were not fulfilled in such a case. SWIFT, J., said:

"It was argued on behalf of the appellant that, as the Benchers had lost no money by his act, there was no evidence of any intent to defraud. It was contended that there was at most evidence of an intent to deceive. The distinction between the two intents was mentioned by BUCKLEY, J., in *Re London & Globe Finance Corp., Ltd.* (2): 'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' In this case there was, in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude."

I think that those words can be applied to the present case. There was an intention here of using this document, which was obtained by William Potter pretending that he was Alan Frederick Potter, in order that Alan Potter might obtain a driving licence. It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right but their duty not to take if they had known the true facts. Moreover, if one may state another ground, it was to induce the county council to part with a chattel, to wit, a piece of paper (the driving licence) on which there was certain printing and certain statements, and I cannot see why that piece of paper is not quite sufficient in order to form a basis for this charge. The county council were induced to part with it and induced to hand it over so that it became the property of Alan Frederick Potter. Those are the two points which are taken with regard to count 2, and, as I have indicated, I find that that count is a true count in law on the facts which are admitted in this case.

I should add, that count 2 is against both defendants, and the way in which it is put against Alan Potter is that he was an accessory before the fact. He took the necessary steps of handing over the appointment card to William Potter so that William might produce the card to the examiner who was going to test the driving and Alan gave that card to William for the express purpose of William deceiving the examiner. That seems to me to be a perfectly good charge, and, as Alan would be an accessory before the fact, he may be charged as a

(1) (1931), 22 Cr. App. Rep. 160.

(2) [1903] 1 Ch. 728.

principal in the same way as if he had done the act himself. I, therefore, hold that the second count is a good count on the assumption that the facts in the depositions are proved.

Then we come to count 3, which is the procuring of the licence to drive. Count 2 is in respect of the certificate given for securing the licence, count 3 being in respect of the licence itself. Precisely the same points were taken on that count and I need say nothing more. As I find those points fail, count 3, in my judgment, is a good count.

Count 5 which again relates to the driving certificate, is a count against William Potter, and it is under s. 4 (1) of the Forgery Act, 1913, which reads:

"Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment . . ."

I have held that there was here an intent to defraud, so the only other question is: Was this a forgery? Counsel for the defence submitted that it was not a forgery because it does not come under s. 1 of the Act of 1913. The opening words of s. 1 (1) are: "For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine . . ." Was this then the making of a false document? Section 1 (2) sets out certain cases in which the document is to be deemed to be false; it starts with the words: "A document is false within the meaning of this Act if . . ." and then it sets out different requirements. If I were confined to s. 1 (2), I should not find that the driving certificate was a forgery, because I do not think that this document comes within any of the provisions of the sub-section, but the Criminal Justice Act, 1925, s. 35 (1), reads:

"For the purpose of removing doubts, it is hereby declared that a document may be a false document for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in any such manner as is described in s. 1 (2) of that Act."

I am, therefore, not limited to the cases set out in s. 1 (2) of the Act of 1913 and I have to ask myself the simple question: Was the driving certificate made a false document when William Potter put on the piece of paper the signature which represented the signature of his brother. I think that it is necessary to look a little carefully at that document. It is a document which is made under the Road Traffic Acts, 1930 to 1947. It is clearly issued by the county council in order that they may see that, before a driving licence is issued, the person to whom the licence is issued has duly passed his test for driving a motor vehicle. It is described as a certificate of passing a test of competence to drive. It is a document which came into existence after the driving test had been held. After a person has passed the driving test, the examiner fills in the name of the person who has passed that test and the group of vehicles for which the person was tested, and the examiner signs his name. This certificate was filled in with the name of Mr. Alan Frederick Potter, and the address, 98, Tudor Road, Leicester. There is no doubt that, when the examiner passed that document over to William Potter, he thought that he was passing it over to Alan Frederick Potter, and William Potter well knew that that was what the examiner thought. William Potter well knew that he was at that moment falsely pretending that he was his brother, Alan Potter. On the back of the document are the words:

"This is not a licence to drive. Do not lose this certificate which must be taken or sent to your county or county borough council with your application for a driving licence. If you lose this form, a duplicate may be obtained

from the supervising examiner of your traffic area on giving four days' notice and payment of 1s. The successful candidate must duly sign this form below in ink or in indelible pencil in the presence of the examiner who carried out the test."

There is no dispute in this case but that William Potter well knew when he was putting the signature of "A. F. Potter" on that document that he was purporting to put that signature on the document in the pretence of himself being, in fact, Alan Frederick Potter. It was necessary for him to sign it in the presence of the examiner. He did so and he deceived the examiner. He made it possible for his brother, Alan Potter, to take the document to the authority and obtain a driving licence. He made it possible for his brother therefore to deceive the authority into thinking that he, Alan Frederick Potter, had passed the test. I ask myself this simple question: When William Potter put that signature on that document, was that document then a genuine document or a false document? I hold that it was a false document. It was a false document because it was falsely filled in. It was falsely filled in because William Potter knew that he had no right to fill it in; he knew that, in filling it in in the name of A. F. Potter, he was doing something to deceive, and he knew that he did that with intent that his brother could defraud. I hold, therefore, that it is a forgery because it was the making of a false document. That being so, in my judgment, count 5 is a good count.

So far as count 4 is concerned, it seems to me that the entry in the driving examiner's journal was equally false and for the same reasons as those which I have stated regarding the certificate of competence to drive. I do not think that I need add anything further in regard to that count.

Count 6 is against Alan Frederick Potter, and it is that he uttered a forged document under s. 6 of the Forgery Act, 1913. The forged document is the certificate with which I have dealt under count 5. There is no doubt that Alan Frederick Potter used it, in other words uttered it, handed it across the counter to an official on the other side of the counter, well knowing that it was forged. That being so, in my judgment, these counts are good counts in law on the assumption that the facts which are in the depositions are true facts.

[The defendants then changed their pleas in respect of the counts to which they had previously pleaded Not Guilty. Each of the defendants was fined £25, to be paid at the rate of £2 a week, and in default of payment was sentenced to two months' imprisonment.]

Solicitors: *Chapman & Goddard*, Leicester; *Herbert Simpson, Son & Bennett*, Leicester; *Sawday, Wright & Co.*, Leicester.

G.F.L.B.

COURT OF APPEAL

(HODSON AND PEARCE, L.J.J., AND UPJOHN, J.)

February 24, 1958

BATHAVON RURAL DISTRICT COUNCIL v. CARLILE

Housing—House of local authority—Increase of rent—Need of previous determination of tenancy—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 85 (6).

The defendant was tenant of a house of which the plaintiff council was landlord on a weekly tenancy which expired at midnight on any Sunday, the rent being £1 5s. 7d. a week, due in advance on Monday of each week. By notices dated Aug. 21, 1956, and Mar. 22, 1957, the council informed the defendant that they proposed to increase his rent by 12s. a week as from Apr. 1, 1957. By s. 85 (6) of the Housing Act, 1936 (now replaced by s. 113 (4) of the Housing Act, 1957), a local authority "shall from time to time review rents and make such changes . . . as circumstances may require." The defendant refused to pay the increased rent, and on June 14, 1957, the council served on him a notice to quit the house by noon on Monday, July 1, 1957. In an action by the council for possession of the house, arrears of rent, and mesne profits,

HELD: section 85 (6) of the Act of 1936 did not empower the council to raise the defendant's rent without having first terminated the tenancy; the purported notice to quit of June 14, 1957, was bad as it sought to terminate the tenancy at a time other than the end of a current week's tenancy; and, therefore, the action failed.

APPEAL by the plaintiff council against an order of His Honour JUDGE ELDER JONES made in Bath County Court dismissing the council's claim for possession of a house, 53, Frederick Avenue, Peasedown St. John, near Bath, let by the council to the defendant tenant at a weekly rent of £1 5s. 7d. a week, and for arrears of rent and mesne profits. The grounds of appeal were that the county court judge was wrong in law and misdirected himself in that he held as follows: (i) that a notice of increase of rent pursuant to s. 85 (6) of the Housing Act, 1936, served by the council on the tenant on Mar. 22, 1957, was not effective to make the increase of rent recoverable in law on and after Apr. 1, 1957; and (ii) that a notice to quit the house by noon on Monday, July 1, 1957, served by the council on the tenant on June 14, 1957, was not a good and valid notice to quit.

Harold Williams, Q.C., and Huntley for the council.

Megarry, Q.C., and G. A. Forrest for the tenant.

Cur. adv. vult.

Feb. 24. **HODSON, L.J.**, read the following judgment of the court: The defendant became tenant of the house on Monday, Mar. 28, 1955, and the relevant terms of the agreement are to be found on a rent card issued to him by the Bathavon Rural District Council. The material terms are 1 and 2 of the general conditions of tenancy printed on the card:

"The rent is due in advance on Monday in each week and no arrears will be allowed . . . The tenancy may be terminated by either side by the giving of one week's notice in writing before 12 noon on any Monday."

The rent was fixed at £1 5s. 7d. a week, with a provision that, if there were no arrears on the Friday preceding Whit Monday, the August Bank Holiday and Christmas and the Thursday preceding Easter Monday, a rebate equal to a week's rent would be allowed during the holiday week.

The defendant was a weekly tenant, and there is no question between the parties but that the weekly tenancy runs from Monday until Sunday night; i.e., the midnight between Sunday and the Monday following that Sunday. On Aug. 21, 1956, the council gave notice to the tenant by letter that they had decided as from Apr. 1, 1957, to operate a differential rents scheme and by a further letter to him dated Mar. 22, 1957, they purported to increase his rent by 12s. a week as from that date. The tenant did not pay the additional 12s. a week, and the claim for £10 7s. 2d. represents arrears at 12s. a week from the week beginning Apr. 8 to that beginning June 24 (inclusive), with additions for the rebates for two weeks forfeited by the tenant under the terms of the scheme.

The contention of the council was that the notice of Aug. 21 had the effect of raising the rent of the house so as to make it recoverable in law by virtue of the Housing Act, 1936, without any variation of the terms of the contract. Section 83 (1) gives power to the council to make such weekly charge for the tenancy or occupation of the houses as they may determine. Section 85 (5), for which has now been substituted the provisions of s. 113 (3) of the Housing Act, 1957, reads:

"In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit."

Section 85 (6) reads:

"The authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require."

Section 85 (7) reads:

"The authority shall make it a term of every letting that the tenant shall not assign, sub-let or otherwise part with the possession of the premises, or any part thereof, except with the consent in writing of the authority, and shall not give such consent unless it is shown to their satisfaction that no payment other than a rent which is in their opinion a reasonable rent has been, or is to be, received by the tenant in consideration of the assignment, sub-letting or other transaction."

The council rely on the terms of s. 85 (6) as giving authority to review rents so as to make the tenant liable ipso facto, once the review has been made, for an altered rent. We agree with the learned county court judge that this view of the Act is not tenable. In the case of periodic tenancies, the right of the tenant is to enter into and remain in occupation until he receives notice to quit, and until the landlord by a positive act exercises his right to terminate the tenancy the original contract persists. The sub-section imposes a duty on the authority to review rents and make such charges as may be necessary in the interests of such authority itself and of the tenant and also negatives the possible inference which could be drawn from the preceding sub-section that rents once fixed were not open to review. It makes no provision for any form of notice, so that, if the authority's contention is correct, the rent could be raised forthwith by the authority and could run at some higher figure before any notice was given to the tenant. Further, the tenant would be bound to continue at the higher rent until such time as he could give a valid notice to the landlord determining his tenancy. There is nothing in the section which gives the authority power to override the contractual rights and obligations of the parties. That the letting is contractual is not disputed and is borne out by the language of s. 85 (7), which has been read. Unless Parliament has otherwise provided, the powers and

duties of the authority can only be exercised in accordance with the general law which in this matter requires the tenancy to be determined lawfully by a notice to quit before a new tenancy at a different rent can be created.

This is not the first time that a problem of this character has fallen to be decided. Under the Rent Restrictions Acts permitted increases of rent may be made, and it was decided in *Newell v. Crayford Cottage Society* (1) that a condition precedent to the making of such increase was the termination of an existing contract of tenancy by notice to quit. This decision was approved by the House of Lords in *Kerr v. Bryde* (2). It is true that in the House of Lords opinion was divided, but the argument which caused the difficulty was based on the particular words of s. 3 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which referred to the landlord's right to increase rent being dependent, not on whether he would be entitled to possession, but on whether he would be entitled to "obtain possession". No such difficulty appears in the instant case, and the language of LORD SUMNER is apt to fit the question which this court has now to consider. He said:

"I can find nothing either in the language or the policy of this legislation to show that it was intended to permit a landlord to raise a rent during a period in which under an existing contract, however arising, he was not entitled to do so, or was only entitled to do so after a notice had been given and had expired. Wherever the tenant has, for a time which is or can be made certain, the right to hold possession at a given rent, these Acts do not seek to take away that right."

We should add that the necessity of giving a formal notice to quit in Rent Act cases is now abolished by the Rent Restrictions (Notice of Increase) Act, 1923, in cases where notice to increase rent is duly given.

The second question raised by the appeal is highly technical and depends on the validity of a notice to quit dated June 14, 1957, which is in the following terms: It is headed with the council's name,

"Notice to quit, to Mr. T. H. Carlile, 53, Frederick Avenue, Peasedown St. John. I hereby give you notice to quit and deliver up the premises known as 53, Frederick Avenue, Peasedown St. John, near Bath, by noon on Monday, July 1, 1957. Dated this June 4, 1957".

a Friday, signed by the clerk of the council. If the notice was good, and not otherwise, the council are entitled to judgment for mesne profits as claimed from July 1, 1957, to the date of the hearing.

It was contended by the council that, on the true construction of the notice, it being agreed that the tenancy ended on Sunday night and not on the Monday following, the notice expired at the same time as the tenancy notwithstanding the words "by noon on Monday, July 1, 1957". A. L. SMITH, L.J., said in *Sidebotham v. Holland* (3):

"It cannot be denied that the law upon notices to quit is highly technical; but the technicalities are too deeply rooted in our law to be now got rid of . . ."

This question depends on such a technicality which can be justified because a notice to quit is a unilateral act determining a tenancy without the consent of the opposite party and as such must be strictly construed. The rule of law is that a notice to quit is bad which does not expire at the proper time.

(1) [1922] 1 K.B. 656.

(2) 87 J.P. 16; [1923] A.C. 16.

(3) [1895] 1 Q.B. 378.

The opinion of LUSH, J., in *Queen's Club Gardens Estates, Ltd. v. Bignell* (1) that the true view was that, in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period was expressly approved by the Court of Appeal in *Lemon v. Lardeur* (2). It is scarcely necessary to point out that the trap laid by this technicality is commonly avoided by the addition of words to the effect that, if the date mentioned is not the real date on which the period expires, then the notice to quit is to expire on the proper day of expiry next after the expiration of the current period.

The next matter to consider is whether a notice expressed to end on the day following the expiration of the period can be good. The answer is "Yes" and is to be found in *Sidebotham v. Holland* (3) and in a later decision of the Court of Appeal in *Crate v. Miller* (4). In the former case, which concerned a yearly tenancy, LINDLEY, L.J., delivered a judgment in which LORD HALSBURY concurred, A. L. SMITH, L.J., doubting, but not dissenting. The tenancy there began on May 19 and a notice to quit on May 19 was held to be good, that being the anniversary of the commencement of the term. There is a passage in the judgment of LINDLEY, L.J., which contains this language:

"The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

This passage supports the contention that the notice in this case is not rendered bad by expiring on Monday, for, as LINDLEY, L.J., pointed out, a notice to quit on the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before, although he continued by saying that such subtleties should be and were disregarded as out of place, no doubt on the principle of *de minimis non curat lex*. However, since the decision of this court in *Crate v. Miller* (4), also the case of a weekly tenancy, it seems clear that the true explanation of this principle is, not *de minimis non curat lex*, but that the court construes a notice given for the anniversary as a notice expiring at the first moment of the anniversary. SOMERVELL, L.J., there delivered the judgment of the court and applied the decision of *Sidebotham v. Holland* (3) to a weekly tenancy, holding that a weekly tenancy which begins on Saturday and ends on Friday may be determined validly by the landlord giving either a notice to quit on Friday or a notice to quit on Saturday, for in either case the notice is properly construed as a notice to quit when the current week ends, for a notice to quit on the last day of the current period and a notice to quit on the day after that day are both equally intimations that the last day of the current period is the last day of the tenancy.

The council argued on these authorities that, if notice expiring on Monday was good, it could not be rendered bad by the addition of the words "by noon". The answer is that, while "Monday" without more can be construed (as the authorities show) as meaning the first moment of the day (the preceding midnight), "by noon on Monday" cannot be so construed. The council seek to escape from this conclusion by reading the notice as if it expired at midnight and contained a licence to continue in occupation until noon of the following day:

(1) [1924] 1 K.B. 117.

(2) [1946] 2 All E.R. 329; [1946] K.B. 613.

(3) [1895] 1 Q.B. 378.

(4) [1947] 2 All E.R. 45; [1947] K.B. 946.

compare *SALTER, J.*'s consideration of such a possibility in *Queen's Club Gardens Estates, Ltd. v. Bignell* (1). The words will not, however, bear this construction, for the words "by noon on Monday" are expressed to mark the expiration of the notice itself and there is no room for a licence to remain on the premises after

the expiration of the tenancy. The council cannot, in our judgment, avoid this conclusion by treating the words "by noon" as surplusage which can be disregarded. Such an attempt failed in *Page v. More* (2), which was considered in *Sidebotham v. Holland* (3). This was an action for double value under the statute 4 Geo. 2, c. 28, s. 1, for holding over after a notice to quit. We recognise that this statute was of a penal nature and *LINDLEY, L.J.*, in *Sidebotham v. Holland* (3) treated the decision in *Page v. More* (2) as authoritative only in an action for double rent (sic value) when it was necessary to be more particular. The tenancy was from year to year expiring on Dec. 25 and the notice was expressed so as to demand surrender of the premises at twelve o'clock noon on Dec. 25, 1847. The court refused to reject the words "twelve o'clock at noon" so as to make the notice good, and *LORD CAMPBELL, C.J.*, said:

"The defendant, holding as he did, was entitled to keep possession till midnight on Dec. 25 . . . The defendant is told that, in the event of his not 'so surrendering', that is at twelve noon, the plaintiff will demand rent at 7s. a day till he can obtain possession. How can that be a demand of possession at the time when the tenancy expires? . . . I can see no difference between a wrong day and a wrong hour of the day: a demand for the 24th would have been insufficient; and this is equally so."

The language of the Lord Chief Justice applies with great force to a notice of such short duration as a week as compared with the six months' notice which he was considering.

We agree with the learned county court judge on both points and would dismiss the appeal. That is the judgment of the court.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co.*, for *D. M. Woodward*, Bath;
Knapp-Fishers, for *Faulkner, Creswick & Gould*, Midsomer Norton.

G.F.L.B.

- (1) [1924] 1 K.B. 117.
(2) (1850), 15 Q.B. 684.
(3) [1895] 1 Q.B. 378.

CHANCERY DIVISION

(ROXBURGH, J.)

February, 28 1958

Re S. (AN INFANT)

Infant—Custody—Order of justices—Order involving transfer of infant from mother to father—Application of mother for stay pending appeal—Proper course for justices to adopt.

The infant was under five years old and had always lived with its mother. The parents were married, but at Easter, 1956, they had separated. The infant continued to live with the mother, but the father saw the infant at fortnightly intervals for about one year thereafter. On the father's application the justices, on February 24, 1958, committed the legal custody of the infant to the father and granted the mother right of limited access. Counsel for the mother applied for a stay of the order pending an appeal, but the justices refused to grant a stay and gave no reason for so doing. The father then attempted to take the infant from the mother, but she refused and the infant remained with her. Notice of appeal by the mother against the order was served on February 25, 1958. Next day the mother applied ex parte to the Chancery Division and it was then ordered that the infant should remain in her custody until February 28, 1958, or until further order in the meantime, and liberty to serve notice of motion for that date was granted. On the hearing of the motion.

HELD: (i) where justices are satisfied that there is a genuine intention to appeal from an order made by them transferring an infant from one parent to another and there is no urgency for the transfer it is not normally in the interests of the infant to refuse a reasonable stay pending the appeal;

(ii) where the justices consider that such a stay ought to be refused, unless there is a greater sense of urgency, the order should be made to take effect after a few days to allow the party aggrieved to apply to the High Court;

(iii) there being no sense of urgency in the present case, a stay would be granted and the infant would remain in the custody of the mother until the hearing of the appeal.

MOTION by the mother for an order that the custody of an infant remain with her, pending the hearing of her appeal from an order of the Bedford justices that the custody be given to the father.

T. A. C. Burgess for the mother.

W. A. B. Forbes for the father.

ROXBURGH, J.: I am hearing this case in open court because it raises a matter of great public importance and one which often causes me a good deal of embarrassment when I hear appeals from magistrates about the custody of infants. It is common knowledge that it is not a good thing for a child of tender years to be bandied about between contending and conflicting parents. I often feel when I hear appeals that one reason why I ought not to vary an order is that, the order having been carried out by the transfer of the care or control of the infant, if I reverse the order the child must be returned to the former care and control, and that is exactly the process that I think everybody concerned with the welfare of infants deprecates. I often ask counsel who appear before me, "Why did you not ask for a stay from the magistrates? It would have been much easier for you to have succeeded on this appeal if you had, because there would not then have been this bandying about of the infant". Some counsel have indicated that it is not easy to get a stay. If this case is at all typical, that must be overwhelmingly true and, as I think the lamentable events which did, in fact, follow the refusal of the magistrates to grant the stay must really be attributed to that refusal which, in my judgment, was not justified, this is a very good occasion on which to point out why it is desirable in cases where the magistrates' order involves a change of custody that they

should grant a stay, if there is a genuine intention to appeal. I want to make it clear, however, that I do recognise that there are cases in which it would be quite right to refuse a stay even though there is to be a change of custody and even though there is a genuine intention to appeal. There are cases where even a day's delay might prejudice the welfare of the infant; but this case, quite obviously, is not in that category, as the facts to which I shall refer make plain. I know that magistrates do not order a stay pending an appeal when they think that the emergency is too great. I can hardly believe that this case was in that category, but if it seemed to them to be in that category they could at least have said that the order should not take effect for four days; that is to say, they could have made the transfer of care and control take effect four days after the decision. Again, there might be a case of extreme urgency in which that might be the wrong thing to do, but normally that would not be so, and then the unseemly events which have happened in this case would not have occurred. It is for those reasons, not with any desire to make a public display of what has happened in this case, that I have dealt with this in public.

In this case, the father and the mother are married. The child was born on Oct. 16, 1953 (a boy) and is, therefore, under five. The wife left her husband at Easter, 1956, with the child, and the child has always been under her care and control down to today, and is still under her care and control and will, for some time at any rate, continue so to be. On Feb. 24, 1958, the Bedford justices heard a complaint by the father that he and the mother were separated and living apart, and alleging that he was better fitted to have the legal custody of the child. The order which they drew up gave custody of the infant to the father with access to the mother between 2 p.m. and 5 p.m. on Sundays. On the making of that order the justices gave no reason for their decision. Counsel on behalf of the mother at once applied for a stay of the order pending an appeal, but the justices refused the application and gave no reason. For my own part, I cannot think of any reason for refusing the stay, and the justices even now have not given me their reasons for refusing a stay—I do not blame them, because they had no obligation to do so. The order was for the immediate transfer of a small child of under five from the custody of the mother (who had had custody ever since the child was born) to the father, a person with whom the child had not lived. I believe the father had some access, but the child had never lived with the father since Easter, 1956.

In his affidavit the solicitor for the mother stated:

"After the hearing the father made an attempt forcibly to take the infant from the mother, but she refused to part with the infant and there was, in my presence, some disturbance among the persons present when, in my view, the father assaulted the mother's sister. I am informed by the mother and verily believe that when the father attempted to take the infant away from the mother the infant clung to her and commenced screaming and said 'Don't let him take me. Take me home mummy'. I am also informed by the mother and verily believe that when the father and his sister and the mother and her sister together with the infant were in the waiting room before the hearing of the summons the infant inquired 'who that man' was, indicating the father."

That is one side of the story of the scuffle, but I ought to read the other side of the story in case it should be thought that I am necessarily accepting one view rather than the other. I do not mind who was responsible for the scuffle; my point is that it was a most unseemly and improper event and, as I see it, almost the natural consequence of the refusal of a stay in this particular case.

The other side of the story is told by a woman police officer. She says that she was on duty on this occasion, and I think she quite clearly confirms the account which I have given of what took place so far as the magistrates are concerned. She says in her affidavit:

"... The magistrates returned at about 12.55 and the chairman... announced that an order for custody of the child would be made in favour of the father, the mother to have certain rights of access. A legal argument then took place respecting an appeal and a stay of the order. Whilst this was going on, I went and stood near [the mother]. I heard the chairman say that the order would take effect at once. The court then rose and I opened the door to allow [the mother] to leave. Her sister was standing outside the door with the child. [The mother] then went out of the door, picked up the child and carried it hurriedly along the landing towards the stairs. Her sister followed her. When [the mother] got to the stairs, she started to run down them still carrying the child. Her sister followed at the same speed. I ran after them, as I thought [the mother] was taking the child away in breach of the order of the court. I tried to overtake [her sister] but was prevented from doing so as she had her hand on the bannisters. She may have been trying to stop me, but I cannot be sure. When we reached the bottom of the stairs, I said to [the mother] 'You can't take the child away', and she said 'You try and stop me'. She was still holding the child. I then asked her to go into the waiting room at the foot of the stairs, which she and her sister did, taking the child with them. [The father] and his sister, ... had followed me downstairs and were behind me when [the mother] said 'You are not going to take him'. She then tried to leave the waiting room and [the father] and I restrained her. There was then a lot of shouting and the child began to scream and appeared to be very frightened. At this stage, I telephoned Horne Lane Police Station for assistance. When I returned, I saw [the mother's sister] give [the father] a violent push in the chest and he then hit her on the arm with his hand. She did not fall but backed into the table which slid across the room. At this time [the] solicitor for [the father] had arrived and come into the waiting room, which was then rather crowded. [The mother] then hit [the solicitor] quite a spiteful blow with her hand on the left of his face. [The solicitor] then came out of the waiting room and did not retaliate. A general melee then took place between all concerned..."

That is the description of what happened in the precincts of the local court. As I say, I am not concerned to choose between those two stories. I give them with complete impartiality, and if there are summonses for assault, I have said nothing in favour of anybody, or against anybody, except that it was a most unseemly procedure.

That was not all the father and his adviser did. His solicitor knew full well that the mother had instructed her solicitor to appeal. In his affidavit the father's solicitor stated:

"On the following morning I telephoned the mother's solicitors and inquired if the mother was then willing to deliver the said infant to the father, but was unable to obtain any information except that the said solicitors had instructions to proceed with an appeal to this honourable court."

That is why I say, and it is his own admission, that he knew perfectly well that they had instructions to proceed with the appeal.

"I informed the solicitors that if I could not be assured that custody would be given, a complaint would be made to the justices in accordance with the advice of counsel to that effect. No such assurance was given to me."

Then he said that he could not readily find her, but that she was still in Bedford. He seems to think this to be rather a point against the mother, but I do not. He goes on:

"Having regard to the matters referred to in . . . this affidavit, I laid a complaint on behalf of the father before the justices and requested the clerk of the court to expedite the issue service and hearing of the relevant proceedings. I informed the clerk of the court that I had seen the mother and the said infant in [a certain] shop [in Bedford]. I then wrote a letter in the name of my firm to the mother's solicitors, which was delivered to the office of the said solicitors at or about 1 p.m. . . ."

I will read that letter:

"We enclose herewith copy order made yesterday by the court on the hearing of the summons for custody. We understand that your client persists in her refusal to comply with the terms of the order. Furthermore, we have ascertained that she has not today sent her child to the nursery school to which she referred in her evidence before the court, but that, on the contrary, she has him with her at the shop in which she works. This, of course, is totally unsatisfactory and entirely contrary to the interests of the child. We are therefore arranging for the immediate issue of a summons for the committal of your client pending compliance with the order."

I point out that they knew she had instructed her solicitors to appeal. The summons was issued, but the mother applied to me *ex parte* by motion, but with no affidavit, and I was so astonished that the magistrates had not allowed even sufficient time for the mother to apply to me for a stay of execution before insisting on the change of custody that I took what is a most unusual step: I granted an *ex parte* order (notwithstanding the absence of an affidavit) that the infant do remain in the custody of the mother until after today, and I gave leave to serve notice of motion.

As I have already said, there can be, and I dare say that there quite often are, cases in which it is quite right to refuse any stay of an order transferring the custody of a child from one parent to the other, and I am going to look to see whether this is, by any possible criterion, such a case; but I do wish to say that where there is no urgency for the transfer—and I emphasise those words "where there is no urgency for the transfer"—it is not normally in the interests of an infant to refuse a reasonable stay pending appeal if the magistrates are satisfied that there is a genuine intention to appeal. Further, if they think that they ought to refuse a stay, then, unless there is an even greater sense of urgency, they ought not to make the order to take effect instantaneously as distinct from, say, seven days hence, so as to enable the aggrieved party (that is to say, the party aggrieved by their refusal to grant a stay) to apply, as that party is quite entitled to do, to this court to ask for a stay.

I propose now to consider whether there was any conceivable justification in this case for refusing a stay. I must be careful to remember that I am not hearing the appeal. I must be particularly careful about that because the reasons which the justices did not give are now before me in fact. I do not know whether I ought to have looked at them, but counsel for the father was

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anxious that I should, and I have looked at them, and I take no objection to them. I only say this: the prima facie rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother, and where a court gives the custody of a child of this tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule. I go no further than that. It would be wrong for me at this moment to say, whether, in my judgment, there are sufficient reasons in this case for excluding the prima facie rule. Two things are, however, inescapable. The first is that if there are sufficient reasons, they are much weaker than would be the position in a normal case in which care and control is given to the father of a child of such tender years as this child. The second is that nobody can deny that the mother has a reasonable chance of success on this appeal. In those circumstances, I am sure that one must look for some ground of urgency to justify an immediate order for the transfer of possession of the child to the father. The child has never suffered any injury from being with the mother, and there is no suggestion that he will suffer any injury. I cannot believe that a matter of a few weeks would make the slightest difference one way or the other to the welfare of the child. I have studied the reasons which the magistrates have given for their decision to find in them any inkling of urgency, and I can find absolutely none. I therefore order that the infant do remain in the custody of the mother until the hearing of the appeal.

Application allowed.

Solicitors: *Waterhouse & Co., for Burgess & Chesher, Bedford; J. D. Langton Passmore, for Mellows & Sons, Bedford.*

R.D.H.O.

COURT OF APPEAL

(LORD GODDARD, C.J., MORRIS, L.J., AND McNAIR, J.)

February 11, 12, 13, 28, 1958

GOUGH *v.* NATIONAL COAL BOARD

Coal Mine—Breach of statutory duty—Duty to make secure sides of "working place"—Fall of coal from coal face—Coal Mines Act, 1911 (1 and 2 Geo. 5, c. 50), s. 49.

The plaintiff was employed by the National Coal Board as an underground worker in one of their coal mines. On Dec. 2, 1955, when he was working on a coal face, he was directed to go along the coal face and help "filling off" coal. When he had gone some fifty yards along the coal face a large piece of coal came from the side of a working face, and injured him. In an action for damages against the Board the plaintiff alleged that the Board was in breach of its statutory duty under s. 49 of the Coal Mines Act, 1911, in that it failed to make secure the roof and the sides of every working place.

HELD (MORRIS, L.J., dissenting): the obligation imposed by s. 49 of the Act of 1911 to make secure the sides of any working place did not extend to a coal face, and, therefore, the Board was not guilty of a breach of duty under that section.

APPEAL by the plaintiff, Richmond Gough, an underground worker employed by the defendants, the National Coal Board, from a judgment of SALMON, J., in an action brought by him for damages for personal injuries suffered by him when he was struck and partially buried by a piece of coal about twelve feet long and two feet six inches thick, which came away from the top of the coal face.

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The plaintiff alleged that his injuries were due to breaches by the defendants of their statutory duty under s. 49 and s. 50 (2) of the Coal Mines Act, 1911, and to negligence on their part. The particulars of the breach of statutory duty under s. 49 were that the defendants, in breach of the section,

" . . . failed to make secure the roof and sides of every travelling road and working place and/or caused or permitted the plaintiff to walk along the said face for the purpose of getting coal therefrom when the same had not been made secure."

The learned judge held that the defendants were not in breach of their statutory duty under s. 49 of the Act of 1911 because the section did not apply to the coal face; that, on the evidence, the defendants were not in breach of s. 50 (2); and that there was no negligence on the part of the defendants. The plaintiff's appeal related to s. 49 of the Act of 1911 and to the allegation of negligence. The report is confined to the judgments on the question whether the defendants were in breach of s. 49.

Gardiner, Q.C., A. E. James and I. J. Black for the plaintiff.

Thompson, Q.C., and Mynett for the defendants, the National Coal Board.

Cur. adv. vult.

Feb. 28. The following judgments were read.

MORRIS, L.J.: On Dec. 2, 1955, the plaintiff, who was an underground worker in the employment of the defendants, the National Coal Board, was a member of a shift that began work at 7 a.m. At about 7.45 a.m., while he was walking near to the coal face, a large piece of coal fell on him and he was injured. The piece of coal was about twelve feet in length and about two feet six inches thick. The falling coal apparently hit his shoulder and knocked him down. He was rendered unconscious and the coal fell on his legs, one of which was broken. He brought an action against the National Coal Board claiming damages for his injury. The case was heard before SALMON, J., who dismissed the claim, while assessing the damages in the sum of £600 had they been recoverable.

The claim of the plaintiff was put, first, on the basis of breach of statutory duty, and, secondly, of common law negligence. The plaintiff was employed at the Granville Colliery at Donnington. At the period of his accident work was proceeding at a coal face which was known as "B" panel double face. That face was being worked on the long-wall system. The face in question was about one hundred and fifty yards long and the seam of coal was approximately six feet in height. Mechanical coal cutting was in operation. The general system involved progressive winning of the coal from the whole one hundred and fifty yards length of the seam. This meant that by systematic working there was a gradual advance from day to day of the coal cutting machines and of the conveyors and also of the main gate road head and of the built-up packs. The system of working demanded three separate shifts. These shifts were operated in the following way. One shift worked from 3 p.m. until 10.30 p.m. That was the cutting shift. During that period mechanical cutting took place. The seam was cut approximately six inches from the ground. The cut was to a depth into the seam itself of about four feet six inches. When the coal in a seam is thus cut, some of it, then or soon afterwards, falls to the ground. Where it does not so fall, wedges are placed in position to support the undercut coal. These are known as "holing props". If the coal is liable to fall from the outer side of the face, then supports are put in position. These are known as "sprags" and they are placed diagonally, where necessary, against the side of the face. The succeeding shift came on at 10.30 p.m. and worked until 7 a.m. That shift was

known as the "filling" shift. The task of those on the filling shift was to win and get away the coal that could be extracted as a result of the previous cutting. Some of the coal would be on the ground and the remainder was extracted by appropriate means. It is manifest that, as such work proceeds, continuous and systematic supporting of the roof and sides is necessary. As the coal is obtained it is put on a conveyor which leads to the conveyor in the main gate or supply road. The next shift came on at 7 a.m. and worked until 3 p.m. The main normal task of those employed in that shift was to make all the necessary preparations for the next stage of advance into the coal face. The supply road had to be advanced and its roof and sides made secure. There might be a need to remove stone so as to give the necessary height of roof in the supply road. Packs would have to be built up at suitable intervals so as to support the roof in the space created by the extraction of coal. Stone secured in the process of raising the height of the supply road could be used for building up the packs. The necessary preparations would have to be made near to the then existing face of coal which, in the succeeding shifts, would be operated on by the cutters and the fillers. Hence rails would have to be advanced to new positions nearer to and parallel with the new coal face. At the end of the work done during such third shift, preparations would be complete to enable new cutting to be made at the coal face to a new further depth of four feet six inches so as to enable further coal to be secured. So the cycle of operations would continue. As the coal was extracted, so, from time to time and constantly, had support to be provided in place of the support previously given by the extracted coal. Under a system of long-wall coal mining some of the supports which are used must, in the nature of things, be in position for only a short time. As advance continues the places where men once worked are left behind in the area in the rear of the packs which is known as the "waste". The supply roads are continually advancing. They will be in use so long as the seam is being worked. They require systematic and progressive attention so as to ensure that the newly added daily extensions are secure for their purpose.

The plaintiff was, as a ripper and packer, a member of the third shift to which I have referred. When he went to work on the morning of Dec. 2, he found that the previous shift had not been able to do all that they would normally have done. There had been some trouble with a conveyor. As a result the coal had not been won and removed. Accordingly, it was necessary for the men on the third shift to take away coal before they could perform their normal and expected tasks. The plaintiff was directed to go to the coal face. He went along the supply road and then turned to his right and proceeded some fifty yards. He was intending to proceed further when the piece of coal fell on him. He had passed a number of men on his shift who had already begun their work of "filling off" the coal.

It is provided by s. 49 of the Coal Mines Act, 1911, that:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It has not been in dispute that the plaintiff was at his "working place" at the time of the accident. In their defence in the action the defendants admitted that:

"... on the date and at the time and place alleged in the statement of claim a large lump of coal fell or slid from the coal face and struck the plaintiff. The place where he was struck was a working place within the meaning of s. 49 of the Coal Mines Act, 1911."

The question, therefore, arises whether the large piece of coal which fell on the

plaintiff came from the side of a working place. If it did, it cannot be doubted that the side had not been made secure. It is said, however, that the coal at the coal face itself should not be regarded as constituting either the roof or the sides of a working place. A question of much importance is here raised. It is one that has received judicial consideration in a number of cases. The learned judge held in this case that the defendants were not in any breach of their statutory duty, for he held that s. 49 does not apply to the coal face itself. He thought that, since the whole object of mining is to take down the coal face, it should be held that the section is not applicable to men actually working at the coal face.

Although I am conscious that there is much judicial support (though not binding on this court) for the view of the learned judge, I do not find myself able to share it. In my judgment, the section applies to every working place. The section is imperative. It creates an absolute obligation. I see no warrant for reading into the section any words of exclusion. In my judgment, it would be strange if the section were inapplicable to cover the place where the need to achieve security is most marked. The section is in that part (Part 2) of the Coal Mines Act, 1911, which contains provisions as to safety. It is implicit in the work of extracting coal that some place or places will be made insecure. It is that very circumstance that makes it necessary to impose an obligation to make secure and also to have careful, elaborate and systematic rules in regard to safety and security. The whole operation of mining involves that there is a constantly changing situation. As insecurity is created, so new security must be provided. As the coal in a seam is taken away, so new support must be put in position to replace the support that has been removed. It is, I think, important to have in mind that the obligation is that the roof and sides of a working place "shall be made secure". This language involves that there is a state of insecurity that demands attention. The obligation is not to keep secure. Such an obligation might well be impossible of fulfilment in the course of coal mining operations. The very nature of coal mining brings it about that in the process of removing coal from its resting place, there will be a withdrawal of support with consequential temporary instability and insecurity. But in the interests of safety the risks must be minimised and, accordingly, there is an absolute duty to make secure.

Under s. 50 of the Act of 1911, as amended by the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973), certain rules have to be made; but the obligations under s. 50 do not supplant the general obligation imposed by s. 49. A consideration of s. 50 and of the rules made under it does, however, serve to illustrate that the roof and sides at the face itself are not excluded but are included. Section 50 (1) refers to the roof at the working place, and it is provided that:

"... the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported . . ."

The props or chocks used to support the roof must be set at such regular intervals and in such manner as may be specified in rules which are known as the "Support Rules". It seems to me that the roof is that which is above a man who is getting coal or filling tubs. The area of the roof may extend as work progresses but the roof must be, not only adequately, but "systematically" supported. It is provided by s. 50 (4), as amended, that the manager of a mine must make rules

"... specifying in relation to each seam of the mine, particulars of the system or systems of controlling and supporting the roof and sides to be carried out in connexion with the face workings, the roadheads and the roads, respectively . . ."

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If a man is working at the face, it seems to me that that which is above him is the roof and that the exposed surfaces which are about him are the sides. The peril to which he is exposed is the peril that something may fall on him either from the top or from the side. It is this very peril which he and all others must avert. That can only be done by the systematic and continuous erection of new supports in places where, as a result of the mining operation, they are newly needed. Accordingly, there must be compliance with the general obligation imposed by s. 49, and also with any specific or detailed ones imposed by s. 50. In the Support Rules which were made in reference to this working face, it was provided:

"When the fall of roof or side involving the displacement or breakage of supports has occurred in any place where any person has to work or pass, any newly exposed roof or sides shall at once:—(1) be dressed, if necessary; and (2) be secured by supports before the work of clearing any debris other than such work as is necessary to set supports, is begun."

It would seem to me to be very strange if this did not cover a newly exposed roof or side consisting of coal at the working face. There will be a newly exposed side when coal is taken down. Those employed in the filling shift are each assigned a stint which consists of a certain number of yards of frontage of the coal face. A man may begin to extract coal from the centre part of his stint and may at first work inwards so that after a time he will have coal in front of him and on either side of him. As he progresses, so must he make the roof and sides secure. If a man's work involves that he is engaged in the very process of making secure, then (unless he has reason to complain of the conduct of anyone else) he cannot assert that the defendants are in breach of s. 49. The position then is that the defendants, through his instrumentality, are engaged on the actual operation of making secure so as to comply with s. 49: see *Walsh v. National Coal Board* (1).

Provision is made in the Act for inspections prior to the commencement of work. Section 64 (1) is as follows:

"The firemen, examiners, or deputies of a mine shall, within such time not exceeding two hours immediately before the commencement of work in a shift as may be fixed by the regulations of the mine, inspect every part of the mine situated beyond the station or each of the stations [as to which see s. 63], and in which workmen are to work or pass during that shift, and all working places in which work is temporarily stopped within any ventilating district in which the men have to work, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned."

I would think it very strange if such inspections of roof and sides of working places were not to include inspections of the actual face of the coal itself. That face, particularly if it has been undercut, may constitute a great source of peril for those who are sent there, if it is not made secure. It is further provided by s. 64 (3) that there must be a full and accurate report, not only in regard to gas, but also

"... whether or not any, and, if any, what defects in roofs or sides and other sources of danger were observed . . ."

In the printed form which was used in this case to report after inspection, there is a heading "Condition of roof and sides", followed by the words:

(1) [1955] 3 All E.R. 632; [1956] 1 Q.B. 511.

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"State actual condition of (a) working faces and (b) roads, with location of any unsafe place and action taken."

This serves to illustrate the way in which the system was operated. The construction of the Act must, however, be determined on a fair interpretation of the words which are used and of the context in which they are used.

In the present case, following the inspection made some time between 5 a.m. and 6.30 a.m., it was recorded that the condition of roof and sides was "safe". The word used in s. 49 is "secure", and no synonym or paraphrase of that word need be used. In its context it does not seem to me to denote an immutable or permanently static condition of affairs. What is required, in my judgment, is that, when a man is either on a travelling road or at a working place, that which is on top of him and that which is around him shall be made so that it does not fall on him. In the present case the plaintiff was at a point where the work of attacking the face of the coal had not, in his shift, yet begun. The coal face should, in my judgment, have been made secure to enable the men on the new shift to approach it or pass along it. The men on the last shift should have made it secure before they left. As the plaintiff proceeded along, he had the coal face on his left, and on his right he had, at intervals, a number of built-up packs. He was, admittedly, at a working place. I do not understand it to be doubted that, if some stone from one of the packs had fallen on his right shoulder, the defendants would have been in breach of s. 49. It is said, however, that, because the insecure thing that struck him on his left shoulder consisted of coal from the face, there was no breach of s. 49. For the reasons which I have given, I cannot agree with this submission. It would seem to me to be unfortunate if it were held that the obligation to make secure the roof and sides of a working place does not apply if the working place is at a coal face itself. That involves reading something into the statute. It would involve diminishing the scope of the statutory obligation at the very place where, in the interests of safety, compliance with it is most needed.

I have not thought it appropriate to refer to or to consider the Mines and Quarries Act, 1954, the provisions of which are now in operation in the place of those contained in the Coal Mines Act, 1911, now repealed. The Act of 1911 was in force at the times which are relevant in this case.

Although the obligation under s. 49 is absolute: see *Edwards v. National Coal Board* (1); a measure of protection is given by s. 102 (8) which provides:

"The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

As, in my judgment, it was shown that the defendants were in breach of s. 49, the question arises whether they are protected from liability in this case on the ground that it was not reasonably practicable to avoid or prevent the breach. As the learned judge was of opinion that there was no breach, it was not necessary for him to express a conclusion in regard to this matter. Authoritative guidance in regard to the considerations to be had in mind is to be found in *Marshall v. Gotham Co., Ltd.* (2). If the view which I have formed in regard to the statute is the correct view, then the question arises whether there is sufficient or satisfactory material on which to reach a conclusion whether it was reasonably practicable to avoid or prevent the breach. This matter is to some extent

(1) [1949] 1 All E.R. 743; [1949] 1 K.B. 704.

(2) [1954] 1 All E.R. 937; [1954] A.C. 360.

bound up with an issue which arises in regard to the common law aspects of the case.

[His LORDSHIP referred to the plaintiff's allegations that the defendants were guilty of negligence and were also in breach of their statutory duty under s. 50 (2) of the Act of 1911, as amended. After reviewing the evidence of the deputies, His LORDSHIP referred to the findings of the judge that holing blocks were inserted as required by the Support Rules, that any overhanging coal or stone was supported by sprags, and that the deputies had tapped the surface in accordance with mining practice, and His LORDSHIP said that these findings could not be challenged. His LORDSHIP then referred to the evidence of Mr. Blower (who became manager of the mine on the day of the accident) that the fall of coal which injured the plaintiff was due to a fault known as "slickenside", and that slickensides were quite frequent on this coal face. His LORDSHIP considered that, although Mr. Blower's evidence came at a late stage, it appeared to contain a revelation of most significant circumstances, and, as the main substance of the evidence was accepted, His LORDSHIP would think it unsatisfactory without further investigation to reject that part of it which depended on information obtained by the manager in his capacity as manager, although in reference to an earlier period. His LORDSHIP continued:] The conclusion which I have reached is that it was shown that there was a breach of the obligation imposed on the defendants by s. 49. In my judgment, it becomes necessary on this basis to have a further hearing in order to decide whether the defendants are exculpated from liability on the basis of s. 102 (8), i.e., whether the defendants can show that it was not reasonably practicable to avoid or prevent their breach of duty in failing to make secure the roof and sides of the place where the plaintiff was when he was injured. I think also that, in regard to the common law claim, there should be a further hearing on the issue whether, in the light of what the defendants knew, or ought to have known, in regard to the coal seam in question, they failed to take reasonable care to avoid exposing the plaintiff to unnecessary risks. There should be no reopening of the other issues which were decided by the learned judge in the ways that I have mentioned. For the reasons which I have given, I would allow the appeal and, to the extent which I have indicated, order a further hearing.

McNAIR, J., stated the facts and said that he accepted the learned judge's conclusion that the accident was due to a fault, known as slickenside, which, in the present case, was for all practical purposes undetectable. After reviewing the evidence of Mr. Blower, His LORDSHIP said that the evaluation of that evidence was essentially a matter for the learned judge, that the judge's appreciation of that evidence was correct, and that His LORDSHIP would, accordingly, dismiss the appeal in so far as it was based on an allegation of negligence. His LORDSHIP continued: I now turn to the second point raised in the appeal, namely, whether it is established that the defendants committed, in respect of the place from which the coal fell, a breach of the statutory duty imposed by s. 49 of the Coal Mines Act, 1911. The section, which is included in Part 2 containing "Provisions as to Safety", provides:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It is conceded that the obligation imposed on the owner of a mine by this section is an absolute obligation qualified only by s. 102 (8), which provides:

"The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

The argument for the plaintiff on this branch of the case can be stated in the simplest form as follows: (i) The defendants, by para. 2 of the defence, admit that the place where the plaintiff was struck was a working place within the meaning of s. 49; (ii) as he walked along the coal face to the place where he was struck, he had on his left hand side the coal face which was a side of this working place; (iii) the fact that the coal which struck him fell from the coal face established that the face had not been made secure. The learned judge rejected the argument in a short passage of his judgment which reads:

"The main point, however, remains that s. 49 of the Act of 1911 cannot be intended to apply to the coal face because the whole object of mining is to take down the coal face, and, therefore, a section which refers to an obligation to make secure the sides of a working place, and prohibits anyone from working in such a place which has not been so made secure, cannot, in my judgment, be intended to apply to the coal face itself."

After stating this conclusion, the learned judge said that, if the word "safe" had been substituted for the word "secure", he would have decided the point the other way. Although I agree with the learned judge that "secure" here does not mean "safe" but means a physical condition of stability which will ordinarily result in safety, I do not, for my part, feel that the substitution of the word "safe" would affect the problem.

The question whether a coal face or a ripping face is the side of a working place, within the meaning of s. 49 of the Act of 1911, had, before the decision of SALMON, J., been considered by three judges of the Queen's Bench Division on circuit and two Scottish judges of the Outer House, and since the present decision a similar but not identical point has been considered by myself, also on circuit; and, with one possible exception (an unreported decision of BYRNE, J., in *Penny v. National Coal Board* (1)), those decisions have been consistent in holding that the coal face is not such a side. The most fully reasoned judgment on this point is to be found in the opinion of LORD CAMERON (Lord Ordinary) in *Elliot v. National Coal Board* (2), which was followed by LORD WHEATLEY, in *Young v. National Coal Board* (3). Neither of these decisions has, we were informed, been considered by the Inner House.

In *Elliot v. National Coal Board* (2) the pursuer was undoubtedly injured by a fall of mineral substance of some kind which occurred while he was working in a working place. The pursuer alleged that it was a heavy fall of stone from the opencast above the coal face, but in his judgment LORD CAMERON said that it was by no means clear on the evidence from what precise portion of the area of the opencast the fall came, and, in particular, whether it was proved to have come from the face of the opencast; but, in view of the fact that the case proceeded on the basis of unchallenged fact that whatever fell on the pursuer fell from the face in the area of the opencast, LORD CAMERON held that the critical issue was "whether the face of this opencast is comprehended within the statutory words 'sides of . . . a working place'." LORD CAMERON observed that

"... the whole purpose of the long-wall method of mining is to cut coal by advancing the face and to do so by progressive destruction and removal

(1) (Jan. 27, 1955), unrep.

(2) 1956 S.C. 484.

(3) (July 5, 1956), unrep.

of the face itself, a process which is the complete antithesis of supporting and making the face secure and . . . consequently the condition as well as the function of the face in long-wall working is totally different from that of the sides proper or the rear or waste of the working place."

After making that observation, LORD CAMERON turned to the precise construction of s. 49, and said:

"Now the Act does not define roof or sides, but it is plain enough that at least in one important particular they can be differentiated from the face, because, once a roof or what is indisputably a side of a working place or a travelling road is in existence, it will not be subject to interference or deliberate destruction for the purpose of winning coal from it, and therefore measures already taken for its security may be expected to have a certain quality of permanence. Therefore I think that in the circumstances the effect of specific reference to portions of a working which, in the sense I have mentioned, are markedly different from the face itself is to suggest that the face from which the coal is won may have been deliberately excluded from the requirement of this peremptory and penal section and is not comprehended sub silentio in the word 'sides'."

After referring to the provisions of s. 50, and, in particular, those referring to the Support Rules relating to the support of roof and sides of face workings, and to the absence of any requirement that the face itself should be supported, LORD CAMERON came to the conclusion that

". . . by limiting the application of s. 49 to the roof and sides of travelling roads and working places the legislature excluded from the scope of the obligation of security imposed by that section the face of the working place itself."

In *Young v. National Coal Board* (1) LORD WHEATLEY expressed his view as follows:

"The purpose of the section is manifestly to secure that where a person has to traverse a road or work at a working place, his surroundings will be made secure to prevent a fall of material, whether it be coal or stone or dirt or anything else which might endanger his safety. There is thus envisaged the taking of precautions to provide a permanent security to prevent the occurrence of such an event, but I cannot see how that can be extended to embrace the coal face when the whole purpose of this mining operation is systematically and continuously to strip the face and bring down from the face the very materials against which the workman has otherwise to be protected. From that point of view it would make nonsense of the section to include the face in the expression 'sides', and in my opinion the section cannot be deemed to provide for such an inclusion."

Turning now to the English cases, JONES, J., in *Boyd v. National Coal Board* (2), observed that s. 49 did not apply to a fall from the face itself. In *Green v. National Coal Board* (3) OLIVER, J., stating that it was perfectly obvious that it would be impossible to maintain that the working face should be made secure when the whole object of the work was to knock it to pieces, held that a man injured by the fall of a stone from the face was not protected by s. 49. BYRNE, J., in *Penny v. National Coal Board* (4), after holding that a cutter man employed

(1) (July 5, 1956), unrep.

(2) (Dec. 14, 1954), unrep.

(3) (Dec. 20, 1955), unrep.

(4) (Jan. 27, 1955), unrep.

at the coal face was entitled to recover at common law in respect of injuries which he suffered when an overhanging stone fell from the ripping face, on the ground that the defendants knew of the danger of the overhanging stone but took no steps to ensure that the place was rendered safe, also held that the plaintiff was entitled to recover under s. 49 on the ground that the face was a side of a working place, stating that, if any other construction were to be put on this section, it would follow that, so far as the coal face of any mine was concerned, the coal face could be left without any support of any kind without committing a breach of the statute. With respect, I consider this reasoning is fallacious, since it overlooks the protection given by the Support Rules under s. 50 (2). I refrain from commenting on my own decision in *Carney v. National Coal Board* (1), given at the autumn assizes at Manchester on Dec. 16, 1957.

In view of the decisions of the Scottish courts and the desirability of consistent decisions in both jurisdictions, it would, in my judgment, be wrong for this court to arrive at a contrary decision on this matter of construction, unless those decisions and the reasoning on which they are based are, in the view of this court, plainly erroneous. In my judgment, so far from being plainly erroneous, they are correct. It seems to me to be wholly unrealistic and artificial to say that, when a man is employed to bring down a face of coal in front of him, that face of coal is the side of a working place which has to be made secure, when the whole object of the operation is to make it insecure. The fallacy in the plaintiff's argument seems to me to lie in the false assumption that every working place underground has a roof and four sides. In truth, the coal face on which he is operating is part of his working place itself and does not cease to be part of his working place if, in the process of breaking in, he makes a hole in the face and then proceeds to work either way to the boundaries of his stint. No doubt, in the progress of his work at the face, he will, according to prudent mining practice, insert props and sprags to provide temporary security from the risks of falls from above him or from his sides, but such props or sprags would not be put up in discharge of the defendants' obligation to make the roof and sides of the working place secure. The cutter who makes the initial cut in the face, thus rendering the face insecure, his mate who inserts the holing props under the undercut coal, the shot-firer who in cases of necessity still further reduces the stability of the face, are all working in a working place, but it would be absurd, as I see it, to hold that the statute imposes on the defendants in all these cases the absolute obligation of making the face secure. Indeed, on the evidence in this case, it is plain that on this particular seam, after the cutter has done its work, the face, in many places at least, would not even have the characteristic of a side, namely, a vertical plain surface, since a substantial portion of the face—put by one witness as eighty per cent.—“rates off” or falls down as soon as the cutter passes and lies with the gummings made by the cutter on the floor. In my judgment, accordingly, the appeal should be dismissed.

LORD GODDARD, C.J. (read by MORRIS, L.J.): I agree with the judgment of MCNAIR, J., and would dismiss this appeal. The point of general importance in the case is the true construction of s. 49 of the Coal Mines Act, 1911, which hitherto has not been the subject of a decision by an appellate court, either in England or Scotland. Considering how long the section has been in force, it is remarkable that the question whether the coal face could itself constitute the side of a working place does not appear ever to have been raised until December, 1954, when it was rejected by JONES, J., in *Boyd v. National Coal Board* (2).

(1) (Dec. 16, 1957), unrep.

(2) (Dec. 14, 1954), unrep.

To the same effect were the judgment of OLIVER, J., in *Green v. National Coal Board* (1) and that of MCNAIR, J., in *Carney v. National Coal Board* (2), of which we were furnished with transcripts, although a contrary view was taken by BYRNE, J., in *Penny v. National Coal Board* (3). In 1956 there were two decisions in the Outer House of the Court of Session, first by LORD CAMERON in *Elliot v. National Coal Board* (4), and then by LORD WHEATLEY to the same effect in *Young v. National Coal Board* (5), of which we have a transcript. I find the judgment of LORD CAMERON entirely convincing, as did LORD WHEATLEY, and can add nothing to it. I cannot think that the coal face which is being worked can properly be described as the side of the working place.

[HIS LORDSHIP then dealt with the allegation of negligence and said that he saw no reason for reversing the learned judge's decision that no claim at common law had been established.] *Appeal dismissed.*

Solicitors: *Stafford Clark & Co.*, for *Hooper & Fairbairn*, Dudley; *F. W. Dawson*, Dudley.

F.G.

- (1) (Dec. 20, 1955), unrep.
- (2) (Dec. 16, 1957), unrep.
- (3) (Jan. 27, 1955), unrep.
- (4) 1956 S.C. 484.
- (5) (July 5, 1956), unrep.

HOUSE OF LORDS

(VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW AND LORD DENNING)

January 15, 16, March 6, 1958

DIRECTOR OF PUBLIC PROSECUTIONS *v.* HEAD

Criminal Law—Carnal knowledge—Mental defective—Person whose original detention in institution was unlawful—Mental Deficiency Act, 1913 (3 & 4 Geo. 5 c. 28), s. 56 (1) (a).

The respondent was convicted and sentenced on two charges of carnal knowledge of a woman in October, 1956, contrary to the Mental Deficiency Act, 1913, s. 56 (1) (a), while she was on licence from an institution for mental defectives. The woman had been committed to an approved school and in July, 1947, had been transferred to a certified institution under an order made by the Home Secretary under s. 9 of the Act. Thereafter continuation orders and orders transferring her to other institutions had been made. On the respondent's appeal against conviction, the invalidity of the original order for detention (owing to defects in the medical certificates) was admitted and the conviction was quashed on the ground that, as the woman had not been lawfully made subject to the Act of 1913, s. 56 (1) (a) did not apply. On appeal to the House of Lords by the Crown,

HELD: proof that a person was detained as an inmate in one of the specified institutions and was under care or treatment therein as a defective or was shown by production of the licence to be out on licence from a place to which the system of licences under the Act of 1913 was applicable was *prima facie* proof that the person was a defective lawfully under care and treatment as such, but the foundation for the presumption, in the case of a person under detention or on licence, was the legality of the detention, and, if it were shown, or (as in the present case) admitted, that on the face of the documents produced and received in evidence without objection, the detention was illegal, the whole basis of s. 56 (1) (a) and the presumption of defectiveness went; the invalidity of the original order of detention had not been cured by the continuation orders and a subsequent re-classification of the woman placing her in a different category of defectiveness; and, therefore, the appeal would be dismissed.

APPEAL by the Crown, pursuant to a certificate of the Attorney-General, from a decision of the Court of Criminal Appeal (LORD GODDARD, C.J., DONOVAN and

HAVERS, JJ), quashing a conviction of the respondent, John Shorttriggs Head, at Carlisle Assizes, before HINCHCLIFFE, J., and a jury on two charges of carnal knowledge of Elfreda Henderson, a mental defective, for which he was sentenced to four month's imprisonment.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Rodger Winn and A. S. Booth for the Crown.

Guthrie Jones for the respondent.

The House took time for consideration.

Mar. 6. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts of this case are fully set out in the opinion of my noble and learned friend, LORD TUCKER. I will not occupy time by stating them myself, though I am conscious that the few observations that I have to make are not easily intelligible without them. I do not doubt that questions of great importance are directly or indirectly raised by the judgment of the Court of Criminal Appeal in this case, but, in accordance with the practice which has consistently been observed since the Court of Criminal Appeal was established, they were not formulated for the consideration of the House. In the result, I have, for my part, found it difficult to determine exactly what is the question for decision—and by that I mean, of course, the question which is at issue between the Crown and the respondent in this appeal. I should not think it desirable, particularly in a criminal case, to travel outside that issue.

The bald facts of the case are that the respondent was charged with having had carnal knowledge of a woman who was placed out on licence from an institution for mental defectives, contrary to s. 56 (1) (a) of the Mental Deficiency Act, 1913. He was convicted, but on appeal the conviction was quashed. It was quashed on the ground that the woman was not lawfully detained in the institution. The Lord Chief Justice (LORD GODDARD) said that, where a man was prosecuted for this offence (now an offence against s. 8 of the Sexual Offences Act, 1956),

“evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the Act at the time of the offence.”

DONOVAN, J., used similar language. The documents under which the woman was detained were, in fact, produced at the trial. I need say no more than that, on the face of them, they appeared to be defective. The Attorney-General, in the Court of Criminal Appeal, admitted that, in appropriate proceedings, they could be successfully challenged, e.g., on a writ of habeas corpus. He did not recede from this admission before the House, but contended that it was irrelevant whether or not in such proceedings they could be challenged. He urged that the relevant section of the Act was passed for the protection of a certain class of women, amongst them women

“... under care or treatment in an institution ... or whilst placed out on licence therefrom ...”

He conceded that, in its context, the expression “under care or treatment” meant under care or treatment as a mental defective, but contended that, if the woman was, in fact, under such care or treatment in an institution or placed out on licence therefrom, it was not open to the defendant to question the legality of the detention. He pointed out that the proviso gives adequate protection to a man who, being charged with the offence, proves that he did not know, and had no reason to suppose, that she was a defective.

Eng Per.

My Lords, this House, no less than other courts of law, is traditionally jealous to safeguard the liberty of the subject; but I agree with the learned Attorney-General that such a consideration is irrelevant to the present case. Is it the man's liberty or the woman's that is at stake? Not his, unless a man is to be at liberty to have carnal knowledge of any woman who is under treatment in an institution on the chance that a defect may be found in the order of detention; nor hers, for she is not a party, nor are the proper authorities, parties to the proceedings, and her eventual liberty will be determined by other considerations beyond those of a defect in an order made many years ago.

I speak with diffidence knowing that I differ from the Court of Criminal Appeal and from the majority of your Lordships, but I cannot refrain from saying with what anxiety I regard the possibility that, as a result of this decision, whenever a man is charged with this offence, he can, though he knows that the woman is under care or treatment as a mental defective, demand to see all "the relevant documents" (whatever they may be) and, finding perchance a flaw in them, successfully plead that she was not lawfully detained and that he, therefore, has committed no offence. I must, I think, assume that any defect which would support a writ of habeas corpus would be available to him, and, further, that the same result would follow whether the woman was, as in the present case, on the high road to recovery or was such a defective as to stand in particular need of the protection afforded by the Act.

I would, therefore, decline to read s. 56 of the Act as imposing on the prosecution the burden of proving that the person under care or treatment in an institution or placed out on licence therefrom was not only in fact under such care or treatment or so placed out on licence but also was lawfully detained.

The Attorney-General supported his case by the plea that, if the prosecution had to prove lawful detention of an inmate of an institution, the burden of proof might be very heavy, and this plea was much debated. If, on its true construction, the section imposes this burden, I respectfully doubt whether it is material that the burden is heavy or light. In the view which I take, this question does not arise, but, if it did, I should be content to adopt what my noble and learned friend, LORD TUCKER, says about it, and I would join in the reservations made by my noble and learned friend, LORD SOMERVELL OF HARROW.

One other point should be mentioned. It was not clear to me whether one of the questions at issue in this appeal was whether, in a prosecution for this offence, the Crown must prove that the woman was, at the time of the offence, a mental defective. I think that at one time the learned Attorney-General was inclined to accept that burden. But, if so, he was, in my opinion, wrong. I believe that all your Lordships take the same view.

The appeal will, in accordance with your Lordships' opinion, be dismissed with costs.

LORD REID: My Lords, I have had the advantage of reading the speeches about to be delivered by my noble and learned friends. I agree with that of LORD TUCKER, and I would concur in the reservations to be made by LORD SOMERVELL OF HARROW.

LORD TUCKER: My Lords, on May 22, 1957, the respondent was convicted of two offences against s. 56 (1) (a) of the Mental Deficiency Act, 1913, after a trial before HINCHLIFFE, J., and a jury at Cumberland Assizes held at Carlisle. He appealed to the Court of Criminal Appeal who quashed his conviction on Nov. 1, 1957. The Director of Public Prosecutions now appeals to this House pursuant to the certificate of the Attorney-General granted on Nov. 11, 1957.

The indictment contained two counts alleging that the respondent on two occasions in October, 1956, had carnal knowledge of a girl named Elfreda Henderson, a mental defective on licence from an institution for mental defectives. It will suffice to set out one of these counts, which reads as follows:

"Statement of Offence. Carnal knowledge of mental defective, contrary to s. 56 (1) (a) of the Mental Deficiency Act, 1913.

"Particulars of Offence. John Shortriggs Head on Oct. 7, 1956, in the County of Cumberland had carnal knowledge of Elfreda Henderson a woman on licence from Dovenby Hall Hospital, an institution for mental defectives."

The superintendent of Dovenby Hall gave evidence for the prosecution, and produced and put in evidence certain documents relating to the girl Henderson for the purpose of proving that she was lawfully detained as a defective and duly let out on licence on the material date. The documents included an order made by the Home Secretary under s. 9 of the Mental Deficiency Act, 1913, and dated July 2, 1947, for Miss Henderson's transfer from an approved school where she then was to a certified institution, as defined in the Act, in Cornwall. Subsequent orders transferring her to other institutions and finally to Dovenby Hall were also produced. The licence permitting her to be absent was not put in evidence. DONOVAN, J., in the Court of Criminal Appeal, was mistaken in thinking it had been proved and received in evidence.

Counsel for the defence challenged the validity of the girl's detention and certification as a defective as disclosed by these documents. HINCHCLIFFE, J., ruled that the Home Secretary's order of July 2, 1947, was conclusive and the defence could not go behind it and, in his direction to the jury, he told them as a matter of law that, on the documents produced, Miss Henderson was properly certified as a defective and, on the uncontradicted evidence of the superintendent, Dr. Ferguson, she was a mental defective. In substance, therefore, the only real issue left to the jury was as to the acts of carnal knowledge which were proved by the girl and not seriously challenged. Having been warned by the superintendent, when the girl had been out on licence on a previous occasion; that she was a patient on licence from the institution as a defective, a defence under the proviso to s. 56 was not open to the respondent and he did not give evidence. He was, accordingly, convicted.

Amongst the documents put in evidence at the trial were the two medical certificates required by s. 9 of the Act for the satisfaction of the Secretary of State before he could make a valid order for the girl's transfer to an institution at which she would be under compulsory detention as a defective. These certificates stated that she was a moral defective, but neither of them showed that she "required care, supervision and control for the protection of others" which is, by s. 1 of the Mental Deficiency Act, 1913, as substituted by the Mental Deficiency Act, 1927, an essential requirement before any person can be classified as a moral defective. In the Court of Criminal Appeal (LORD GODDARD, C.J., DONOVAN and HAVERS, JJ.), the Attorney-General admitted the invalidity of the original order of the Secretary of State, and the court, holding the resulting detention unlawful, quashed the conviction.

In the Court of Criminal Appeal two judgments were delivered, one by the Lord Chief Justice and one by DONOVAN, J. The Lord Chief Justice stated the contention of the Crown as follows:

"The Attorney-General submitted that all that the prosecution had to prove to establish a case in addition to the fact of carnal knowledge having taken place was that the girl was in fact in an institution for care or treatment

or that she was out on licence from such an institution. He submitted that the section did not require proof that the girl was a defective."

Before your Lordships, I understood the Attorney-General to say that the prosecution must prove that the girl in question was an inmate in one of the institutions named and receiving care and treatment therein or on licence therefrom and that, at the time of intercourse, she was a mental defective. I understood this as meaning that proof of mental deficiency must be given in addition to, and independently of, the fact of lawful detention. At the conclusion of his judgment the Lord Chief Justice said:

"So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence, which is now an offence against s. 8 of the Sexual Offences Act, 1956, evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the Act at the time of the offence."

DONOVAN, J., used these words:

"Accordingly, I think that the prosecution were right to produce the various documents relating to the woman's detention, and to produce the licence. Nor do I think that such a practice, which ought to be followed, can lead to any great difficulty unless there are many of these patients illegally detained, which I prefer not to suppose."

The Attorney-General submitted that these statements placed a burden on the prosecution which was not justified by the Act, and that they would tend to result in a trial within a trial of issues more suitable to proceedings by way of habeas corpus or certiorari, or in actions for false imprisonment, and that the necessity for strict proof of documents made, or facts having taken place, many years ago would, in some cases, render prosecutions impossible.

My Lords, it will be apparent from what I have said, and, indeed, the Court of Criminal Appeal so stated, that this appeal raises questions of considerable importance with regard to the construction of s. 56 of the Act and the matters essential for the prosecution to prove. It may be convenient at this stage to set out s. 56 (1) in full, and to refer to certain other sections of the Act before stating what I consider to be the answer to the problems which have been raised.

"56—(1) Any person—(a) who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act; or

"(b) who procures, or attempts to procure, any woman or girl who is a defective to have unlawful carnal connexion, whether within or without the King's dominions, with any person or persons; or

"(c) who causes or encourages the prostitution, whether within or without the King's dominions, of any woman or girl who is a defective; or

"(d) who, being the owner or occupier of any premises, or having or acting or assisting in the management or control thereof, induces or knowingly suffers any woman or girl who is a defective to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; or

"(e) who, with intent that any woman or girl who is a defective should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, takes or causes

to be taken such woman or girl out of the possession and against the will of her parent or any other person having the lawful care or charge of her;

"shall be guilty of a misdemeanour and shall be liable upon conviction on indictment to be imprisoned, with or without hard labour, for any term not exceeding two years unless he proves that he did not know, and had no reason to suspect, that the woman or girl was a defective."

Section 1, as substituted, defines mental defectives, and the provisions thereof relevant to the present case are as follows:

"(1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:—(a) Idiots [who are defined]; (b) Imbeciles [defined]; (c) Feeble-minded persons [defined]; (d) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who require care, supervision and control for the protection of others.

"(2) For the purposes of this section, 'mental defectiveness' means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury."

Section 2 provides for defectives being dealt with under the Act by being sent to or placed in an institution or placed under guardianship. Section 4 deals with sending a defective to an institution or placing him under guardianship by order of a judicial authority or under order of a court, or in the case of a defective detained in a prison or other specified place of a like nature, by order of the Secretary of State. Section 10 authorises the detention of a defective sent to an institution under order, and of a defective placed under guardianship by any such order. And, by sub-s. (2), provides that, subject to regulations, an order placing a defective under guardianship shall confer on the person named as guardian such powers as would have been exercisable if he had been the father of the defective and the defective had been under the age of fourteen. Section 12 (2) enacts that, subject to the foregoing provisions of the section, a defective placed by his parent or guardian in an institution or under guardianship may be detained. Section 30 places on local health authorities the duty to ascertain what persons within their area are defectives subject to the Act (otherwise than under para. (a) of s. 2 (1)), and to make provision for them. Section 49 (2) applies to certified houses all the provisions of the Act relating to institutions and the patients therein. Section 50 enables the Minister of Health to approve certain premises wherein defectives are received in certain circumstances, and such premises are referred to as an approved home. Sub-section (2), however, enacts that it shall not be lawful to receive or detain in an approved home any person ordered to be sent to an institution for defectives under an order of the judicial authority, or a court, or a Secretary of State. Section 56 is in Part 4 of the Act which deals with offences and legal proceedings. Section 52 is, I think, worth setting out. It reads:

"If any person, having been warned by a person appointed to be guardian of a defective under this Act, or by a person under whose charge a patient absent from an institution or from a certified house has been placed, not to supply intoxicants to or for the use of the person under his guardianship or charge, knowingly supplies any intoxicants to or for the use of that person, he shall be guilty of an offence under this Act: Provided that a person shall not be guilty of the offence of supplying intoxicants in contravention of the warning if the person giving the warning refuses, when required so to do, to produce the authority under which he acts,"

It will be observed that the last-mentioned section does not create the offence of knowingly supplying intoxicants to a defective, but of supplying intoxicants after warning to "a person" under guardianship or absent from an institution.

Returning to s. 56, here, also, it will be noticed that nowhere is the simple offence of having carnal knowledge of a defective created, and in sub-s. (1) (a) the word "defective" does not appear. The Court of Criminal Appeal construed the words "under this Act" at the conclusion of sub-s. (1) (a) distributively as applying to the preceding words "under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom", and concluded that the sub-section applies—to quote from the judgment of DONOVAN, J.—only to

"a person who has been found to belong to one of the four categories of defectives specified in s. 1, and who is, in consequence of an order made under the Act, having care or treatment in an institution, or is out on licence by virtue of regulations made under the Act."

My Lords, I think that the presence of the words "or approved home" negatives this construction as there is no machinery anywhere in the Act for placing anyone in an approved home by order or in any other manner. In the present case, however, your Lordships are concerned only with the case of a person who was purported to be detained in, and let out on licence from, an institution under the provisions of the Act.

In my opinion, the sub-section has been carefully framed for the protection of persons who are undergoing care or treatment as defectives in certain specified institutions, or are on licence or under guardianship under the provisions of the Mental Deficiency Act, 1913. The Lord Chief Justice observed that it would, no doubt, be presumed that, *prima facie*, a person in a certified institution was a defective within the Act. I respectfully agree with this view, which is, I think, reinforced by the words "under care or treatment" which, in the context, must mean under care or treatment therein as a defective within the meaning of the Act. In my view, on proof that a girl is detained as an inmate in one of the specified institutions and is under care or treatment therein as a defective or is shown by the production of the licence to be out on licence from one of those places to which the system of licences under the Act is applicable, that is *prima facie* proof that she is a defective lawfully under care or treatment as such, and I think the Attorney-General—if I correctly understood him as previously stated—was assuming an unnecessary burden if he meant that it is incumbent on the prosecution in all cases under s. 56 to satisfy a jury by medical evidence that the girl in question comes within one or other of the categories specified in s. 1. I think this is to be presumed. But the foundation for the presumption, in the case of a person under detention or on licence, is the legality of the detention and the necessity for a licence to justify the patient's absence, and, if it is shown or admitted, as in the present case, that, on the face of the documents produced and received in evidence without objection, the detention was illegal, the whole basis of the sub-section and the presumption of defectiveness goes and the prosecution must fail. I do not think anything more than what I have stated above is required to establish a *prima facie* case, but it is right and proper that the prosecution should have in court, and make available for inspection by defending counsel, the relevant orders or other documents on which the detention is based, so that, in a proper case, and subject to questions of admissibility in evidence, the presumption of legality may be rebutted.

My Lords, it remains only to state that I agree with the reasons of the Court of Criminal Appeal for rejecting the Crown's contention that, even if the original

order was invalid, it had been cured by the continuation orders and a subsequent reclassification of the girl by the superintendent placing her in a different category of defectiveness coupled with his evidence to the effect that she was at the material date a defective within that category.

For these reasons, I would dismiss this appeal. I desire to add that I have read the opinion about to be delivered by my noble and learned friend, LORD SOMERVELL OF HARROW, and that I agree with the views expressed therein.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion that has been given by my noble and learned friend, LORD TUCKER, and have nothing I wish to add to it.

I have had the advantage of reading the opinion about to be given by my noble and learned friend, LORD DENNING, and would like briefly to make my reservations. My noble friend thinks that the Secretary of State's order of July 2, 1947, was voidable and not void. I am not satisfied that the order was not void. On the wording of s. 9 of the Mental Deficiency Act, 1913, I think the certificates may well be for this purpose part of the order to be looked at in order to see whether it is good on its face. If they are not part of the order, it might, I think, be maintained that they afford no evidence on which the order made could validly have been based. In either case, I would wish to reserve the question whether the order would not be void rather than voidable.

It is conceded that the court had material before it which would have led to the order being quashed on certiorari or other appropriate proceedings. The next question, as it appears to me, can be stated in this way. Is a man to be sent to prison on the basis that an order is a good order when the court knows it would be set aside if proper proceedings were taken? I doubt it. The case was never argued on these lines before the Court of Criminal Appeal. The distinction between void and voidable is by no means a clear one, as a glance at the entry under "void" in STROUD'S JUDICIAL DICTIONARY shows. I am not satisfied that the question whether a man should go or not go to prison should depend on the distinction.

I would dismiss the appeal for the reasons given by my noble and learned friend, LORD TUCKER.

LORD DENNING: My Lords, the first point is whether it is necessary for the prosecution in such a case as this to prove that the woman was lawfully detained; and, if it is necessary, how are they to prove it. The Lord Chief Justice (LORD GODDARD) gave this ruling on the point:

"So that there may be no doubt on the matter I desire to say that where a man is prosecuted for this offence . . . evidence must be given by the production of the relevant documents that the woman in respect of whom the charge is made was lawfully subject to the [Mental Deficiency Act, 1913] at the time of the offence."

The Lord Chief Justice was, I think, only referring to the case of a woman detained under compulsion, not to a voluntary patient. In such a case I think his ruling is correct. The prosecution must prove that the woman is *lawfully* under care or treatment, and they can only do this by proving that she is *lawfully detained*; and they must prove that she is under care or treatment *as a defective*, not for any other illness. But they need not prove that she is a defective. Suffice it to prove that she is lawfully detained *as a defective*. That raises a presumption that she is a defective. The accused man is protected from any injustice by the proviso which gives him a defence if "he proves that he did not know and had no reason to suppose" that she was a defective,

So also, with a woman "placed out on licence", I think there must be in force a subsisting order for her detention. The medical superintendent cannot grant her a licence to be absent unless he has a right to compel her to stay; and she is only "on licence" so long as there is a right to bring her back: see regs. 95 to 97 of the Mental Deficiency Regulations, 1948 (S.I. 1948 No. 1000), and s. 42 of the Mental Deficiency Act, 1913.

The Attorney-General took exception to the ruling of the Lord Chief Justice. He submitted that it was not necessary for the prosecution to prove that the woman was *lawfully detained*. If there were such a burden on the prosecution, he foresaw great difficulty in discharging it. The prosecution would have to call the medical men who examined the woman many years ago when she was first certified as a defective, and also evidence that she was "found neglected", or whatever else was the particular ground on which she was "dealt with" under the Mental Deficiency Act, 1913. That would be a burden of such magnitude that the imposing of it would make the section a dead letter.

I do not think that the difficulty is nearly so great as the Attorney-General fears. It is only necessary, as the Lord Chief Justice said, to produce the relevant documents. My noble and learned friend, LORD TUCKER, says that it is not necessary even to go as far as that. It is sufficient to prove that the woman detained is an inmate in an institution—under care or treatment as a defective—and then rely on a presumption of legality without giving in evidence any of the relevant documents. I cannot bring myself to go as far as this. It seems to me to offend against a fundamental principle. No one in this country can be detained against his will except under the warrant of lawful authority; and, when that warrant is required by law to be in writing, it must be produced on demand to the person detained and to any other person properly concerned to challenge the detention. When the legality of the detention has to be proved in a court of law, the document itself must be produced. It is the best evidence and nothing less will do. In *The Queen's Case* (1), ABBOTT, C.J., giving the opinion of the judges to this House, said that it

"... is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence": and in *Strother v. Barr* (2), BEST, C.J., said that

"... great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case."

Whilst I readily acknowledge that that rule has been relaxed in modern times, it has never, so far as I know, been relaxed in the case of orders which deprive a person of his or her liberty. If the order is in existence, it ought to be produced. If it is kept back, it raises a suspicion that there is something wrong with it. In 1802, when a man was committed to the Fleet prison for debt, it was held that, to prove that fact, the original warrant of commitment must be produced: see *Salte v. Thomas* (3). And in 1847, when a question arose whether a prisoner in the bridewell at Abingdon was in lawful custody, MAULE, J., ruled that the oral evidence of the governor was not sufficient; nor was the calendar signed by the clerk of assize; but it could only be proved by the record of his conviction at the assizes: see *R. v. Bourdon* (4).

(1) (1820), 2 Brod. & Bing. 284, 302.

(2) (1828), 5 Bing. 136.

(3) (1802), 3 Bos. & P. 188.

(4) (1847), 2 Car. & Kir. 366.

But this would put the prosecution in a great difficulty, says the Attorney-General. The documents do not prove themselves; and it may be next to impossible to prove them strictly. This is a criminal case and the Evidence Act, 1938, does not apply. Counsel for the respondent says that there is no such difficulty. It is sufficient to produce the original orders. I agree with him.

Consider for a moment how legality would be proved in habeas corpus proceedings. If the woman herself applied for a writ of habeas corpus, it would be sufficient for the medical superintendent of the hospital, in his return to the writ, to set out the order of detention and the continuation orders as a justification for her detention. He would not have to prove those orders by calling the makers of them, or by proving the handwriting on them, or anything of that sort: see *Watson's Case* (1). The production of them would suffice: see *Greene v. Home Secretary* (2). If the orders disclosed on the face of them a ground sufficient in law for her detention, the court would hold her detention to be lawful: see *Wilmot's Opinions* (3); unless she could show that the orders were forgeries or that there was no evidence on which the orders could be sustained: see the Habeas Corpus Act, 1816; *Re Bailey, Re Collier* (4); *R. v. Board of Control, Ex p. Ratty* (5). It is true, of course, that the procedure in habeas corpus proceedings is far removed from the present. But if the woman herself—seeking to challenge the legality of her detention in the proper way—can only call for production of the orders for her detention, it would seem strange if a third person—seeking to challenge the legality in his own interests—could call for strict proof of them.

The solution to the difficulty is, I think, this. The orders prove themselves by production of the originals from the proper custody. They are the modern successors of the old inquisitions in lunacy. The findings and orders made on such inquisitions were always receivable in evidence by the production of the original record from the proper custody without more ado. LORD HARDWICKE, L.C., so ruled in 1742: see *Sergeson v. Sealey* (6); and LORD ELLENBOROUGH in 1811: see *Faulder v. Silk* (7); and those cases were applied just over fifty years ago in *Van Grutten v. Foxwell* (8): see *Hill v. Clifford* (9). The inquisition in lunacy has now been replaced by an inquiry by a justice of the peace, a master in lunacy, or other public officer. Just as with the old inquisitions in lunacy, so also with these inquiries into defectiveness of mind, the orders made on them are receivable in evidence on production of the original from the proper custody without further proof except to identify the person who was the subject of the inquiry.

The reason why these orders are admissible is because they are in the nature of proceedings in rem. They affect the status of the individual and her capacity. They are made by a competent public officer whose duty it is to hold a judicial or quasi-judicial inquiry and to record his findings. If he finds that the woman is a defective, many public servants will be called on to take action, some to detain her, others to take charge of her property. It is essential to the orderly and just conduct of business that all these public servants—and any one else concerned with her affairs—should be able to act on the faith of the orders as

(1) (1839), 9 Ad. & El. 731.

(2) [1941] 3 All E.R. 388; [1942] A.C. 284.

(3) (1758), Wilm. 77.

(4) (1854), 18 J.P. 630; 3 E. & B. 607.

(5) 120 J.P. 153; [1956] 1 All E.R. 769; [1956] 2 Q.B. 109.

(6) (1742), 2 Atk. 412.

(7) (1811), 3 Camp. 126;

(8) [1897] A.C. 658.

(9) [1907] 2 Ch. 236; [1908] A.C. 12, 15.

they stand; and should not be put to the proof of the correctness of the findings therein—a task which would often be impossible after the lapse of time. They are, therefore, made admissible in evidence against all the world: see *STARKIE ON EVIDENCE* (3rd Edn.) (1842), Vol. 1, pp. 307-310. An interesting parallel is to be found in the orders made by the Home Secretary during the war for the detention of suspected persons. LORD WRIGHT said in *Greene v. Home Secretary* (1):

"The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good cause for the detention, and needs no extrinsic justification."

Applying this principle, it seems to me that the orders made by a competent authority under the Mental Deficiency Act, 1913, such as the order of a judicial authority under s. 6, or of a Secretary of State under s. 9, or the continuation orders of the board of control under s. 11, are admissible in evidence on production of the originals from the proper custody and on identification of the party who is the subject of the order. If the originals are not available, certified copies are often made admissible by statute. Thus, in the case of an order made by a Secretary of State under s. 9, a certified copy is admissible under the Documentary Evidence Act, 1868. In the case of the continuation orders, there is no need to produce the originals if the secretary to the board certifies, under s. 11 (5), that the initial order has been continued.

What, then, does an order of this kind prove when produced from the public custody? It is conclusive proof of its own existence, that is to say, that an order was made as the document says it was; and it is *prima facie* evidence (but not conclusive evidence) of the truth of the facts recited in it which are essential to its validity; and, if uncontradicted, it ought to be regarded as sufficient evidence of those facts: see *Harvey v. R.* (2); *Hill v. Clifford* (3).

The result is that, in an ordinary case, in order to show that the woman is lawfully detained as a defective, all that the prosecution have to do is to call the medical superintendent to produce the original order for detention and the continuation orders, and, in addition, if the woman has been placed out on licence, to prove that fact. That was done in this case, and was held by the judge at the trial, HINCHCLIFFE, J., to be sufficient. But it was upset by the Court of Criminal Appeal on the ground that, looking at the other documents which were also produced—but not proved—Miss Henderson was not lawfully detained at all. This brings me to the second point.

The Court of Criminal Appeal have held that Miss Henderson was unlawfully detained for more than ten years and have severely criticised all those concerned in detaining her. The Attorney-General has challenged this finding. He admitted before your Lordships that the original order for her detention might have been quashed—if the appropriate application had been made for the purpose—but he contended that it stood until it was quashed and, accordingly, that the continuation orders and the licence were good. He cited LORD RADCLIFFE for his purpose:

"Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get [the order] quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders":

see *Smith v. East Elloe Rural District Council* (4). This contention of the Attorney-General was, in effect, though not in terms, a contention that the original

(1) [1941] 3 All E.R. 388; [1942] A.C. 284.

(2) [1901] A.C. 601.

(3) [1907] 2 Ch. 236; [1908] A.C. 12, 15.

(4) 120 J.P. 263; [1956] 1 All E.R. 855; [1956] A.C. 736.

order was not absolutely *void*, but only *voidable*; and, as it had not been avoided before the continuation orders were made, these remained good. Even if the original order were quashed today, the continuation orders would still be good. This is a point of the first importance which, by itself, would justify the Attorney-General in giving his certificate for an appeal to this House. I have thought it right, therefore, to consider it on principle. But first let me state the relevant facts. These all appear on the documents, and this House is in as good a position to determine them as the Court of Criminal Appeal.

Miss Henderson was born on July 6, 1928, in Cumberland and left school at fourteen. She then went out to work, but when she was nearly sixteen her mother left home. Some months passed. Her father found that she was beyond his control and brought her before the juvenile court as a refractory young person. The court ordered her to be sent to an approved school. She was at an approved school in Somerset for over two years. She then absconded and was brought back by the police. The sister in charge of the school said she was absolutely irresponsible and unfit to be at large. Thereupon the question arose whether she ought not to be sent to an institution for defectives under s. 9 of the Mental Deficiency Act, 1913, which says:

"Where the Secretary of State is satisfied from the certificate of two duly qualified medical practitioners that any person who is . . . in [an approved school] . . . is a defective, the Secretary of State may order that he be transferred therefrom and sent to an institution for defectives . . ."

On June 10, 1947, she was examined by two medical men, one the certifying medical officer for Somerset, the other a medical practitioner in Bath. Each examined her separately, and each certified that he had satisfied himself that she was a moral defective. Then, on July 2, 1947, just before she was nineteen the Secretary of State made this order:

"Whereas, in pursuance of s. 9 of the Mental Deficiency Act, 1913, the above named Freda (properly Elfreda) Henderson has been duly certified to be mentally defective within the meaning of the above mentioned Act as subsequently amended, I hereby order that she be transferred from the school in which she is now detained to the Convent of the Good Shepherd Certified Institution of St. Anne's, Saltash, Cornwall.

(Signed) J. Chuter Ede,
One of His Majesty's Principal
Secretaries of State."

If that order is read with s. 9 (as it should be), it means that the Secretary of State was satisfied from the certificate of the two doctors that Miss Henderson was a defective. This reference to the medical certificates means that they are to be read with the order as part of the record: see *R. v. Medical Appeal Tribunal, Ex p. Gilmore* (1). And "satisfied" in the Act means reasonably satisfied. If, on reading the medical certificates, no reasonable person would have been satisfied that she was a defective, the order is liable to be quashed.

What do the medical certificates show? Each doctor said he was satisfied that she was a moral defective, but each stated insufficient facts to warrant this conclusion. One doctor referred to "her conduct", the other to "her behaviour" without going into details. One said she needed care and supervision "for her own protection", but he did not go on to say that she needed it for the protection of others. The other said nothing about it. It is this defect

which rendered the certificates insufficient. The Secretary of State ought not to have acted on them as they stood. He ought to have referred them back to the doctors for further consideration.

In fairness to the medical men, I would pause to say that it does not follow that their diagnosis was wrong. It is notoriously difficult to describe the characteristics of mental defectiveness. A doctor may well be able to diagnose it by his own observation of the patient's behaviour, but he may not be able to portray her behaviour adequately in words. The trouble with the two certificates may be, therefore, not in a faulty diagnosis, but in the bad expression of their reasons. The rest of the girl's history supports this view. Within a few days of going to the convent in Cornwall, she was found to be of such dangerous or violent propensities that the board of control ordered her to be removed to the Moss Side State Institution at Liverpool—a place specially set aside for serious cases of mental defectiveness. Whilst she was there, continuation orders were made; and, when she became of age, the statutory visitors held the important reconsideration of her case which the law requires. They reported that she was a moral defective and was a proper person to be detained. The statute gives a right of appeal from that decision, but neither she nor her parents appealed. After she had been five years at Moss Side, she had improved sufficiently to be sent to an ordinary institution. She was sent eventually to Dovenby Hall. In 1954, when she was twenty-six, the medical superintendent of that hospital, Dr. Ferguson (who gave evidence at the trial), classified her as a "feeble-minded person" rather than a "moral defective", but she was still a defective within the Act, and the board of control made a continuation order. By Oct. 31, 1955, she had improved so much that Dr. Ferguson granted her a licence to St. Catherine's College, Keswick. He did this so as to try to rehabilitate her. She worked at that college as one of the domestic staff. It was in 1956, whilst she was still out on licence, that the respondent—in spite of explicit warnings—had intercourse with her. In October, 1957, she was discharged. Apparently she was then cured, for shortly afterwards she married another man.

On that history, I ask myself what effect did the initial mistake have on all that followed? Was it the cause of her detention over the next ten years as the Court of Criminal Appeal seems to have thought? I should have said it was not. The chain of causation was broken at innumerable points, just as it was in the celebrated case of *Harnett v. Bond* (1). It was certainly broken on every continuation order. Under the statute, the original order lasted only for one year and would then have expired unless a continuation order had been made. Before this was made, there had to be special reports on the girl by the statutory visitors and by the medical officer, together with a certificate that she was still a proper person to be detained; and it was only after considering them all that the Board of Control made a continuation order. That first continuation order would itself have expired after five years unless another continuation order had been made after another investigation. And so on, from one continuation order to another, she was only detained as a result of an independent decision freshly made after the most careful reconsideration of her case. These continuation orders were not made by automata with a rubber stamp. They were made by responsible people to whom Parliament had entrusted the task. On a just appraisal of the case, these continuation orders cannot be ignored in point of fact, but can they be ignored in point of law?

(1) [1925] A.C. 669.

Counsel for the respondent said that the original order was bad and that, therefore, the continuation orders were bad. They depended on the original order which was itself void. Nothing could save the continuation orders, he said, if the original order was bad. This contention seems to me to raise the whole question of *void* or *voidable*; for, if the original order was void, it would, in law, be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under s. 64 of the Mental Deficiency Act, 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the ten years during which she was unlawfully detained, since it could all be said to flow from his negligent act: see s. 30.

But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it. The application would have to be made by the person aggrieved—Miss Henderson—and not by a stranger; and she would have to make it within six months unless the court extended the time. And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demanded it, but not otherwise. Meanwhile the order would remain good, and a support for all that had been done under it: see the principles discussed in *Dimes v. Grand Junction Canal (Proprietors)* (1); *McPherson v. McPherson* (2). In this case, therefore, if the original order was only voidable, the continuation orders would be good. So would the licence. All dealings with her property would be valid. All the orders would be admissible in evidence: see *Leighton v. Leighton* (3), HUBBACK ON SUCCESSION (1844), pp. 590, 591: and the Secretary of State would not be liable in damages: see *Everett v. Griffiths* (4).

The vital question to my mind is, therefore: Was the original order absolutely void or was it only voidable? If the order had been outside the jurisdiction of the Secretary of State altogether, it would have been a nullity and void: see the *Marshalsea Case* (5). But that is not this case. The most that appears here is that the Secretary of State—acting within his jurisdiction—exercised that jurisdiction erroneously. That makes his order voidable and not void. It is said that he made the order on no evidence or on insufficient materials. So be it. His error is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not: see *R. v. Nat Bell Liquors, Ltd.* (6) per LORD SUMNER). If that error appears on the face of the record—as it is said to do here—it renders the order liable to be quashed on certiorari, but it does not make it a nullity: see *R. v. Medical Appeal Tribunal, Ex p. Gilmore* (7), per PARKER, J.L. Unless and until it is so quashed, it is to be regarded as good. It is, moreover, sufficient to support all the continuation orders made on the faith of it. Even if the original order should be set aside, the continuation orders would remain good; for it is a general rule, when a voidable transaction is avoided, it does not invalidate intermediate transactions which were made on the basis that it was good:

(1) (1852), 3 H.L. Cas. 759.

(2) [1935] All E.R. Rep. 105; [1936] A.C. 177.

(3) (1720), 1 Stra. 308; 93 E.R. 539; *subsequent proceedings*, 4 Bro. Parl. Cas. 378.

(4) 85 J.P. 149; [1921] 1 A.C. 631.

(5) (1612), 10 Co. Rep. 68b.

(6) [1922] 2 A.C. 128.

(1) [1957] 1 All E.R. 796; [1957] 1 Q.B. 574.

see *De Reneville v. De Reneville* (1), per LORD GREENE, M.R.), and *R. v. Algar* (2), per LORD GODDARD, C.J.). Even if the woman applied for habeas corpus, she would be no better off, because the court, on seeing the continuation orders still standing, would not release her, just as it would not release her if it appeared that there would be danger in setting her at large: see *Re Shuttleworth* (3). I would uphold, therefore, the contention of the Attorney-General that, whatever the position of the original order, the continuation orders were good.

Another consequence of the order being only voidable is this: that, on a charge under s. 56 (1) (a), there will be no occasion for a trial within a trial—a trial whether the woman could have got the order quashed within a trial of the man for the offence. That would be a very undesirable state of affairs, but it will not arise if the order is to be regarded by the trial court as good, as I think it must—and as, indeed, HINCHCLIFFE, J., ruled in the present case, I think quite rightly. It all goes to show how important it is to keep this distinction between void and voidable in mind, especially in the case of mental patients. There are many cases in the books where mistakes have been made by medical men in filling in the certificates leading to detention orders. Sometimes it happens through an oversight, sometimes through carelessness, sometimes through misapprehension as to the legal obligation. Very often it is a highly technical ground: see *Murray v. Murray* (4), per SIR WILFRID GREENE, M.R. If these orders were on such a ground to be absolutely void it would lead to much injustice in the law of divorce, the law of tort, and so forth; whereas if they are only voidable, there is no such injustice.

It is the failure to keep this distinction in mind which has led to the difficulties in the present case. Instead of considering whether the original order was void or voidable, the Court of Criminal Appeal considered whether it was valid or invalid, and, having held it invalid, they held that the woman was unlawfully detained; whereas they should have held it was only voidable, and, not having been avoided, the detention of Miss Henderson at the material time was lawful. In quashing the conviction, therefore, they acted on a mistaken ground.

But that is not quite the end of the matter. There is another point. Is it right that the conviction should be restored? The decision of the Court of Criminal Appeal was founded on admissions made by the Crown. I cannot think that the distinction between void and voidable was made clear to the court. I would not allow the Crown to clarify it here at the expense of the respondent so as to obtain a conviction. But I would allow them to clarify it in the public interest. Once a man has been acquitted by an English court, it is altogether exceptional for the Crown to be allowed to appeal from the acquittal. Parliament has only allowed it here so as to enable a ruling to be obtained on a point of law of exceptional public importance. When the Attorney-General comes to this House, seeking for such a ruling, I would, myself, try to give him an answer; and this I have done. But I would not, on this account, restore the conviction if it was not fair to do so, having regard to the course of proceedings in the court below. On this ground, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Director of Public Prosecutions; Ludlow, Head & Walter.*

G.F.L.B.

(1) [1948] 1 All E.R. 56; [1948] P. 100.

(2) 118 J.P. 56; [1953] 2 All E.R. 1381; [1954] 1 Q.B. 279.

(3) (1846), 10 J.P. 760; 9 Q.B. 651.

(4) 104 J.P. 447; [1940] 4 All E.R. 250; [1941] P. 1.

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JUSTICE OF THE PEACE AND

Vol.

COURT OF APPEAL

(LORD EVERSHERD, M.R., PARKER AND SELLERS, L.JJ.)

February 24, 25, 1958

SHEFFIELD CORPORATION v. MEADOW DAIRY CO., LTD.

Rates—Valuation—Shop premises—Agreed valuation by parties of part of hereditament—Jurisdiction of Lands Tribunal to make different valuation—Shop partitioned by ratepayer—Valuation as single shop.

The ratepayers were the occupiers of a lock-up shop in a newly erected building, of which shop they were tenants under a 99 years' lease commencing in 1954. They put up a partition and divided a single room into a sales shop and a store room and "preparation room" behind it. In the valuations submitted by the parties in accordance with the Lands Tribunal Rules, 1956, the sales shop was divided into the front portion, "Zone A," and the rear portion, "Zone B." Both parties put the same value on the store room and "preparation room," and they agreed that the value of "Zone B" was half of that of "Zone A." The issue before the tribunal was the value of "Zone A." The corporation valued it at 26s. per square foot and the ratepayers at 21s. A valuation officer called by the ratepayers put forward as value of "Zone A" 21s. per square foot, but valued the store and preparation room at 5s. 3d. The Lands Tribunal decided the gross value of the hereditament by valuing "Zone A" at 24s., "Zone B" at 12s. and the rear portion at 6s. per square foot on the ground that the ratepayers took a "shell" and fitted it out to suit their own particular trade. The ratepayers appealed to the Court of Appeal contending that the tribunal erred in law in the following manner: (i) There was no issue between the parties as to the value of the rear portion of the shop premises, and by determining that issue the tribunal exceeded its jurisdiction; and (ii) the tribunal disregarded the principle of *rebus sic stantibus* under which the hereditament was required to be valued as it stood at the date of the relative proposal and not when the ratepayers first occupied it.

HELD: (i) if two contesting parties were clearly to agree the value of some part of the subject-matter, *prima facie* the tribunal would have no jurisdiction to depart from that value, unless it appeared that the agreed figure proceeded on some premise which was shown to be wrong in law; in the present case, however, no clear agreement was reached as to the figure for the store room and "preparation room," the testimony of the valuation officer had thrown the matter open, and there was no excess of jurisdiction.

(ii) although the subject-matter to be rated were the premises to be found at the relevant date, the mere fact that there was a partition of some kind did not, as a matter of law, lead to the result that the part of the premises behind the partition was no longer any real part of the shop and was severed from it, and, therefore, the tribunal was entitled to treat the premises as a single shop, and value it accordingly.

CASE STATED BY LANDS TRIBUNAL.

This was a Case stated by the Lands Tribunal (H. P. HOBBS, Esq.) for the decision of the Court of Appeal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, in respect of its decision given on Feb. 5, 1957.

The corporation appealed from the decision of the local valuation court for the West Riding of Yorkshire (South) in respect of a shop and premises, 117 The Moor, Sheffield, on the ground, that the values directed by the local valuation court to be entered in the valuation list were incorrect and insufficient and should be increased to £1,020 gross value and £847 net annual value. The hereditament comprised a lock-up shop which consisted of a sales shop divided in the valuation submitted to the tribunal into Zone "A" (the front portion) and Zone "B" (the rear portion), a store and preparation room behind and ancillary rooms on the upper floors. The solicitor for the corporation in his opening address to the tribunal stated that there was no material difference between the parties on the valuation of the store and preparation room and

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the upper parts of the hereditament. The case proceeded on these lines except for the evidence of a witness, Mr. A. D. Donmall, in his examination-in-chief. (The relevant parts of the opening and the deposition of the witness are to be found in the judgment of LORD EVERSHED, M.R.). The tribunal inspected the hereditament and the other hereditaments with which comparisons were made at the hearing. The proceedings were initiated by a proposal of the corporation dated Mar. 17, 1955, to increase the value of the hereditament from gross value £490, rateable value £405, to gross value £1,075, rateable value £892. The ratepayers duly objected and the local valuation court fixed the assessment at £860 gross value and £713 rateable value. The corporation appealed to the Lands Tribunal and the ratepayers gave notice of intention to appear. In their statement of case the corporation originally asked that the assessment should be increased to £1,020 gross value, £847 rateable value, but this was later, but before the hearing, amended to £975 gross value, £809 rateable value. The ratepayers contended that the decision of the local valuation court was correct. The tribunal decided that the assessment should be £950 gross value, £788 rateable value. On the question of costs the tribunal decided that as the corporation had been successful before the tribunal, the ratepayers should be ordered to pay their costs of the appeal to the tribunal. A copy of the decision of the tribunal was annexed to and formed part of the Case. The questions for the decision of the Court of Appeal were:

(i) Whether on the findings of fact the tribunal was entitled in law to apply a figure of 6s. per square foot to the rear portion of the ground floor. If it was wrong in law in applying this figure of 6s. but entitled to apply the figure of 5s. 3d., then the decision would be £940 gross value, £780 rateable value. If it was wrong in law to adopt either of those courses, then the decision would be £950 gross value, £759 rateable value.

(ii) Whether in the exercise of the discretion given under r. 49 (1) of the Lands Tribunal Rules, 1956, the tribunal was wrong in law in ordering the ratepayers to pay the costs of the corporation.

Ramsay Willis, Q.C., and Amies, for the ratepayers.

Widdicombe, for the rating authority.

LORD EVERSHED, M.R.: By this appeal the Meadow Dairy Co., Ltd., have sought to complain of the decision of the Lands Tribunal in fixing a sum for the rateable value of the appellants' premises in The Moor, Sheffield. When the matter was before the Lands Tribunal, it seems that two premises adjoining were under consideration, that of the Meadow Dairy Co., Ltd., and that of another company called Vogue Fashion Shops (West End), Ltd. There is no appeal in respect of the assessment for Vogue Fashion Shops (West End), Ltd., but I mention the circumstance that their premises were also under consideration since there are references in the decision to both premises; and these references are not intelligible unless it is known what were the two premises subject to the tribunal's consideration.

The appeal come to us by virtue of s. 3 (4) of the Lands Tribunal Act, 1949, which provides that "a decision of the Lands Tribunal shall be final", subject to the proviso that "any person aggrieved by the decision as being erroneous in point of law" may require a Case Stated to this court. Bearing in mind the limitation of jurisdiction, the appellants here have submitted that there were two points of law in regard to which the tribunal was in error. The first is that the tribunal, according to the argument, exceeded its jurisdiction in a certain respect, namely, in giving a figure to part of the premises—a component of the total sum arrived at—when as regards that part, so it is said, there was

never any issue before the tribunal; there was, to use a word found in the Lands Tribunal Rules, no "contention" upon which the Lands Tribunal's decision was required. In the second place, it is said that, in giving this figure for the part which I have mentioned, the tribunal made an assumption which it should not have made; instead of regarding the premises as they then physically were, it took notice of the circumstance that originally—in 1954—the present occupants, the appellants, had taken them under a lease of the premises then consisting of a single undivided building, or "shell", to use the word used in the decision. Since they took the premises, the ratepayers have put in a partition of some kind, and it is complained by the ratepayers here that the tribunal, wrongly in law, have made the assessment as regards the back part of the premises by disregarding altogether their present shape; by disregarding the existence of this partition.

It must be said, I think, that the complaints on the part of the ratepayers are, at any rate, well understandable, and for this reason. They had been successful before the local valuation court, and the matter came before the Lands Tribunal by way of appeal on the part of the Corporation of Sheffield. In accordance with the Lands Tribunal Rules, to which I have already made some reference, the Sheffield Corporation and the Meadow Dairy Co., Ltd., both submitted to the registrar of the tribunal valuations by experts, on which they sought to rely, giving also to each other copies of those valuations.

The case before the tribunal of the Sheffield Corporation was that the gross value of these premises should be fixed at the figure of £975, whereas it was the submission of the ratepayers that £840 was the correct sum. The valuations which were before the tribunal and of which both sides had copies in advance showed how those two sums, £975 on the one hand and £840 on the other, were made up; if you look at them, it is clear that the issue between the parties on the face of the valuations was limited to the figure appropriate to allot to what is called Zone "A" and Zone "B" of the premises.

It seems that, for purposes of arriving at valuations for rating purposes, when you deal with shops you can usefully divide the shop—that is, the part of the premises which fronts on the street or thoroughfare—into two zones; you take the first 15 ft. and you call that Zone "A" and you take the next 25 ft. and you call that Zone "B"; you attribute valuations to the two zones at so much per square foot of the zones, and you work on the basis that the proper sum to appropriate to Zone "B" is 50 per cent. of that appropriate to Zone "A". That no doubt sounds, and in truth is perhaps, a somewhat artificial rule of thumb; but experienced valuers use it as a working hypothesis, and I have no doubt that, if generally applied, it makes matters easier and more intelligible for those who are affected.

In this case it appeared from the rival valuers, Mr. Bewlay for the corporation and Mr. Evans for the ratepayers, that Zone "A" should be given, according to the corporation, a figure calculated at 26s. per square foot., but, according to the ratepayers, at 21s. only per square foot. Everything else then followed as the night the day. Zone "B" was in each case half, 13s. and 10s. 6d. There then was a reference to what is called the "store and preparation room", and both valuations gave 4s. per square foot to that, as they did to the store upon the first floor. It is true that there is a slight difference as regards the store on the second floor; and, as regards that, Mr. Evans, the ratepayers' valuer, put a somewhat higher figure on it than had Mr. Bewlay, for the corporation; but the result only was a matter of £9 and nothing really turns on it. All the rest is simple arithmetic, and you get the resultant figures that I mentioned, £975 and £840.

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When the case came before the Lands Tribunal, the solicitor for the corporation, who had got those figures in front of him, naturally enough supposed that all that the two sides would argue about would be the figure appropriate to attribute to Zone "A"; for, leaving aside the slight variation as regards the second floor, everything else either was an arithmetical consequence or was the same in both valuations. According to the Case Stated, therefore, he said, and said with some show of reason, if I may be allowed to say so:

"I feel, Sir, that we can regard the ground as cleared, since notoriously only the end figure matters (£975 or £840, as the case might be) and the make-up is, shall I say, less relevant. The argument which remains is entirely concerned, therefore, with the zone prices, since both parties halve back from Zone 'A' to Zone 'B' in the conventional manner. The argument can, therefore, be confined entirely, as I see it, to what is the appropriate Zone 'A' figure, and I should propose, Sir, to confine my argument to that point and to confine the evidence to that point as well."

That was a promising start, and, as the Case Stated observed, the case proceeded on these lines, except for the evidence of a Mr. A. D. Donmall in his examination-in-chief. Mr. Donmall was the deputy valuation officer who had been concerned in the fixing favourably to the ratepayers of the valuation by the local valuation court. As the ratepayers had there been successful, it is again perhaps not surprising that learned counsel for the ratepayers thought it might be an extremely good thing to call this gentleman, Mr. Donmall. After all, he could present him as something of a *deus ex machina*; he was not a valuer employed by either side; he was one who had given a decision. He was quite impartial and, consequently, he had not given counsel for the ratepayers a proof of his evidence.

The result of that decision on counsel for the ratepayers' part was, however, in the highest degree unfortunate for the appellants. It is true that Mr. Donmall attributed to Zone "A" in the first instance a lower figure even than Mr. Evans, whose evidence had not yet been given, had put in his valuation. Mr. Donmall put 20s. on it; but it was liable to an increase which brought it up to Mr. Evans' figure of 21s. But then in the course of his evidence-in-chief (and my sympathies are with counsel for the ratepayers, because we have all known this sort of thing happen) the witness, without waiting to be asked questions, thought he would make a few observations of his own, and they included the following:

"May I go back, Mr. Amies, just a moment and pass one comment, because there is something here which does seem to indicate that we are at some difference in regard to the store and preparation room. The price in the rating authority's valuation is 4s., whereas their Zone 'A' price is appreciably higher than mine, yet my price for the stock and preparation room is 5s. 3d. I did that deliberately and I was influenced in doing that because I think that what was allowed to the tenants here was the shop from its front wall to its back wall, and the tenants themselves made their own partition where it pleased them, and I felt it was only right and proper to apply a price which was more *pro rata* the sales price there."

The upshot of that observation was that taking 21s. (the 20s. plus his 10 per cent. increase) as appropriate for Zone "A", we then get, by the usual method of division, 10s. 6d., or 50 per cent., for Zone "B"; but then he went on to make another similar division and divide the 10s. 6d. by two and arrived at 5s. 3d., which he said was appropriate for the store. He said: "Because I think that what was allowed to the tenants was the shop from its front wall to its back wall." In other words, he treated the store and preparation room as,

you might say, Zone "C" or a part—that is, an undivided part—of the shop as a whole.

Once Mr. Donmall had said that, of course, it was plain enough that the 4s. which Mr. Holt, the solicitor for the corporation, had had in mind and mentioned when opening the case was no longer sacrosanct. Here was another possible view of a right figure. Again, it is easy enough to be critical afterwards; to be wise after the event. Counsel for the ratepayers, looking back, might, had he had his time again, have thought it wise to say: "We need not trouble about this 5s. 3d., because we are all agreed that 4s. is the right figure for the so-called stock and preparation room. Confine your attention, please, to Zone 'A'." Whether Mr. Holt would have said: "I do not know whether I quite agree; Mr. Donmall says 5s. 3d.; I do not want to be bound by my 4s." I do not know; but, however that may be, nothing of the kind happened. Counsel for the ratepayers was concentrating no doubt on Zone "A", and he may have thought it wiser—I will use the expression used in argument in this court—"to let sleeping dogs lie"; and it may be that Mr. Holt thought that as the dog did not belong to him, he also should let it continue to sleep; and so the matter went on.

Unfortunately, it went on for a very long time. We are told that no less than six days were occupied with the hearing of this case. Again, I hope, I shall not be offensive to anybody, but it does happen sometimes that the journey is so long that at the end you have lost sight altogether of the country whence you started. However that may be, it is quite plain that the Lands Tribunal felt himself at the end not bound by the 4s. figure, even though Mr. Evans followed Mr. Donmall and reasserted it; and he accepted not the 5s. 3d. in truth, but the basis on which Mr. Donmall had arrived at 5s. 3d., namely, a figure of one-half of Zone "B" or one-quarter of Zone "A". In the end of all, the Lands Tribunal chose for the figure for Zone "A" a figure of 24s.—a figure between the corporation's claim of 26s. and the ratepayers' contention of 21s., though slightly nearer the former than the latter; and he simply worked back from that: 24s. for Zone "A", 12s. for Zone "B", and 6s., or 25 per cent. of the Zone "A" figure, for the stock and preparation room, treating it, as had Mr. Donmall, as part of a single whole. He said:

"In applying this basis (i.e., 24s. for Zone 'A') I have in mind that each of the respondents took a 'shell' and fitted this out to suit their own particular trade, and I think that the rear portion of the ground floor should in each case be taken at 6s. and no addition made for the arcade type of shop front put in by Messrs. Vogue, Ltd."

I have said that Messrs. Vogue, Ltd.'s case is not before us; but, from the passage which I have read, it is apparent that Vogue, Ltd. had put in an elaborate arcade type of fitment or shop front, and the tribunal disregarded it; he thought both these premises ought to be treated alike, as though they were single shells or single entities—shops extending from the front to the very back. A little earlier he had said:

"The appeal properties each consist of a shop on the ground floor, Vogue, Ltd. having an arcade window, and the Meadow Dairy Co., Ltd., having the rear part partitioned off as a store."

Counsel for the ratepayers have strenuously argued that, the case having been opened by Mr. Holt in the way in which it was opened and the two parties, the corporation and the company, having put in, according to the rules, valuations, it was not open to the Lands Tribunal to express any view about what is called the stock or store and preparation room other than the figure of 4s.

Although the members of the Lands Tribunal are men chosen for their experience as surveyors, still it is not competent for them to express their own superior wisdom as compared with the valuers on both sides by substituting some figure when the two experts of the two parties have agreed in effect upon a figure.

I am not myself persuaded that the putting in of these valuations and, in this case, the addition of the opening passages of Mr. Holt's speech have the result of binding the parties as though there were here pleadings containing some admission of a relevant allegation on the part of the plaintiff or his equivalent. We have looked at the various sections of the Local Government Act, 1948 (ss. 40 onwards), dealing with valuation lists, and note the authorities which have jurisdiction to pronounce on them; but I cannot find anything in the sections of the Act of 1948 or in the Lands Tribunal Rules, 1956, which give to these valuations such a restrictive effect on the two contesting parties. It is unnecessary to express any view on the sort of point that counsel for the respondent rating authority raised, where you may have the individual citizen unrepresented, and without expert evidence, and where the only material of an expert nature before the tribunal is a valuation by a valuer on behalf of the rating authority. In such cases it may well be that the Lands Tribunal can fall back on his own experience and that he is not bound to accept everything in the expert valuer's report which is put in for the rating authority. I think it true that, if the two contesting parties were not clearly to agree that, as regards some part of the subject-matter, the proper figure was £x, then *prima facie* the tribunal would have no jurisdiction to depart from £x unless, at any rate, it appeared that the agreed figure of £x proceeded on some premise which was shown to be wrong in law.

But I do not think that in this case the stage is reached when it could be said that there was here so clear an agreement as to the figure for the stock and preparation room that the only matter submitted to the Lands Tribunal was the single item of the figure appropriate for Zone "A". No doubt the parties thought that that was so when they began, and it may be that counsel for the ratepayers thought that Mr. Donmall had not thrown the matter, so to speak, at large; but I do not think the Lands Tribunal here can be shown to have committed an error of law within the contemplation of s. 3 of the Lands Tribunal Act, 1949, by treating, in all the circumstances of the case and after six days of hearing, the whole matter of the appropriate figure for the hereditament as a whole as open to him, including the question how the component parts should be assessed or made up; and I therefore reject the first argument on the part of the appellants and do not think that there was here an error of law consisting in an excess of jurisdiction on the part of the Lands Tribunal.

The second point I have found more difficult, and I remain doubtful in my own mind still what view precisely the Lands Tribunal took of the subject-matter he was assessing. Although the case went on for a very long time, it does not appear that he ever saw the lease or that any evidence was given as to the way in which and the circumstances in which the partition (which no doubt physically exists between the shop facing the street, on the one hand, and the stock and preparation room on the other) came to be erected. There can be no doubt that in valuing for purposes of rating the duty of the tribunal making the valuation is to regard the hereditament as it stands at the time when the valuation is made. If at that time it has been divided up in a particular way, then it is the subject-matter so divided up which has to be rated; and I agree with counsel for the appellants—nor, indeed, do I think counsel for the respondent authority ever argued to the contrary—that it would be

nihil ad rem that the change from the original nature and character of the structure had been made by the tenant rather than the landlord.

The question is: What is it now that you are valuing? But it seems to me still not to follow that there was here an error made or that the tribunal in this case disregarded the circumstances as they were, when he was dealing with the case and looked back at them as they were when the lease had been granted to the appellants in 1954. It is true that some of the language used in the judgment is, to say the least, equivocal: e.g., the reference to the Vogue Co.'s arcade construction and its subsequent rejection as irrelevant lend not a little support to counsel for the appellants' contention that the Lands Tribunal here was erroneously looking at the matter, so to speak, through 1954 spectacles; but, on the whole, I am not satisfied that that really was so. I think the mere fact that there is a partition of some kind at the place indicated on the plan does not, as a matter of law, lead to the result that you must treat the part of the premises behind the partition as being no longer any real part of the shop and as having been severed from it. From the plan it seems that the partition was of a much lighter construction than the outside walls, and the lease, at any rate (which we have now had read to us) shows that the only partitioning permissible to the lessees without the lessor's consent was merely temporary partitions. Whether this is temporary or not (as that word is commonly used) does not appear.

I would observe that the experienced gentleman who was trying this case did go himself and look at the premises. It seems to me that as a fact what he concluded having done so was that, notwithstanding the partition, the premises, the hereditament, which he had to value still was a single hereditament, a single shop, as it had been in 1954, albeit that the rear part had been partitioned off for the purposes and convenience of the tenants. If that is what he saw and found, then I do not myself think that counsel for the ratepayers has made good his second point, namely, that there was an error of law consisting in this: that the valuation was made of the stock room on the footing that there was no partition there at all, and that it should be looked at as it had been when the lease was originally granted to the company. I add that, if on this point I was not satisfied on the matter, it seems to me very probable that we should have to send the matter back; and in this case I cannot think that these parties should be put to yet a further battle on the matter. In view of the argument and the doubts which have been expressed, it is perhaps right that I should emphasise the point (on which indeed there has been no issue between the counsel before us) that the tribunal, or whoever it is who has to make the valuation, must do so on the basis of the premises as he finds them at the time; that is the sub-matter to be rated. We were told by counsel for the ratepayers that the result of this case might affect many others. I am not sure why it should, because each hereditament should be looked at and valued as that hereditament stands; but, in case it is thought that there should be some consequence unjustly adverse to the appellants by our dismissing this appeal, I have ventured to emphasise the point that, whatever may or may not have been done in this case, in other cases it is the law that the rating must be done on the hereditament as you find it at the time.

There was one final point raised in the notice of appeal, namely, a complaint as to costs. At the end of this very long hearing, the figure arrived at by the tribunal—Mr. Holt had called it the end figure—was the figure of £950 gross value, as compared with £975 for which the corporation had sought, and contrasted with the figure of £840 for which the ratepayers had contended, net

rateable values being arrived at accordingly. The figure of £950 was obviously much nearer the contention of the corporation than it was to the contention of the appellants. That was due to the fact that the figure chosen, 24s., for the Zone "A" was nearer the corporation's figure than the ratepayers' figure, and due also, of course, to the fact that the stockroom was written up, so to speak, to 6s.—2s. more than the 4s. figure which had appeared in the original valuations.

As regards the costs this tribunal said:

"The respondents will pay to the appellants one set of costs which are to be agreed or in default to be taxed by the registrar on County Court Scale 3 with discretion to the registrar as to the attendance of the appellants' solicitor at the hearing and a certificate of increase for the fees of the expert witnesses."

The point of the "one set of costs" was, of course, because, as will be remembered, there were two respondents, the Dairy Co., and Vogue, Ltd., and they were ordered to pay one set of costs between them, with some limitations, as I have indicated from the language I read from the end of the paragraph. Had we been persuaded that the Lands Tribunal had erred in point of law in either one or both of the ways suggested and had, as a consequence, the gross value been reduced from £950 to an appreciably lower figure, then I think plainly the question of costs would have been proper subject for reconsideration; but in the circumstances as they are I cannot, for my part, see any basis on which, the tribunal having made no error of law, we could impeach the exercise by him of his discretion as to costs. The result, therefore, upon the whole matter is that I think the appeal must be dismissed.

PARKER, L.J.: I agree, and I would only add a word on counsel for the ratepayers' second point. For myself, I find it very difficult to believe that the tribunal, with his great experience, would have considered valuing this shop in any other state than what it was at the time when he came to make his valuation. Even if this partition was a substantial permanent structure, I think that in that paragraph of his decision he was probably intending to convey that he was not satisfied that the erection of this partition had made the shop less valuable than it was when the tenants took it over as a shell. I would dismiss this appeal.

SELLERS, L.J.: I agree.

Appeal dismissed.

Solicitors: *T. H. B. Bamford & Co.; Sharpe, Pritchard & Co., for Town Clerk, Sheffield.*

F.G.

COURT OF CRIMINAL APPEAL

(CASSELS, SLADE AND HAVERS, JJ.)

March 3, 1958

R. v. ANDERSON

Criminal Law—Sentence—Outstanding offences—Offences by soldier—Trial by court-martial pending—Offences both under civil and military law.

The appellant, a soldier, was committed by a magistrates' court to quarter sessions for sentence. At quarter sessions he asked the court to take into consideration a number of offences in respect of which he was awaiting trial by court-martial, and that request was supported by his commanding officer. The offences included eight offences of larceny from other soldiers, and all constituted offences under civil as well as under military law.

HELD: that as the outstanding offences were offences with which a civil court would have had jurisdiction to deal, quarter sessions could properly take them into consideration in passing sentence, but that they could not have done so had the outstanding offences been of a purely military nature.

APPEAL against sentence.

The appellant, a soldier, was convicted at a magistrates' court of larceny of a cash box and £5, and was committed to Northumberland Quarter Sessions for sentence. He was at the time awaiting trial by court-martial for a series of offences, including eight offences of larceny from other soldiers. The offences were all military offences, but also offences with which a civil court would have had jurisdiction to deal. On Jan. 2, 1958, the appellant requested quarter sessions to take all these offences into consideration, and his commanding officer supported that request. Quarter sessions held that they had jurisdiction to take all the offences into consideration and agreed to do so. They passed a sentence of eighteen months' imprisonment.

No counsel appeared.

CASSELS, J.: Leave was granted to the appellant on an appeal against sentence to come before this court in order that this court might consider the question whether among the cases to be taken into consideration by the court of quarter sessions could be included offences that he had committed as a soldier. He had been awaiting court-martial proceedings for a series of charges which included eight charges of larceny from other soldiers. There is no question that they were military offences; equally there is no question that a civil court also would have had jurisdiction to deal with them. In those circumstances we have come to the conclusion that the court of quarter sessions was entitled to take them into consideration. It is to be observed further that the commanding officer of the appellant's unit asked particularly that the court should take those offences into consideration. If they had been purely military offences and not civil offences also, of course a civil court could not have taken them into consideration; but as they were actually civil offences as well as military offences, the court of quarter sessions, in our opinion, acted properly and we see no reason to interfere with the sentence that was passed.

Appeal dismissed.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., STREATFEILD AND SLADE, JJ.)

March 7, 1958

Re HASTINGS

Criminal Law—Sentence—Validity—One sentence for five offences—Intention to pass concurrent sentences—No reference to sentences being concurrent.

The applicant was convicted on an indictment containing five counts, the first for larceny, the second, third and fourth for obtaining money by false pretences, and the fifth for fraudulent conversion. Separate verdicts were returned on each count. In passing sentence, the recorder said: "You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds . . . you will go to prison for four years' corrective training". The sentence indorsed on the indictment was simply: "To undergo corrective training for four years". The applicant obtained leave to appeal against the convictions on the first three counts. The Court of Criminal Appeal quashed the conviction on the first count and added: "In other respects the appeal fails and there will be no alteration of sentence". The applicant obtained leave to move for habeas corpus on the ground that he was detained in prison when no lawful sentence existed.

HELD: that, although the recorder did not use the word "concurrent", it had manifestly been his intention to pass a concurrent sentence on each count, and, therefore, the sentence was lawful and the application failed.

Per CURIAM: When a court is in fact passing concurrent sentences on each count of an indictment, it is always desirable that the court should use the words such as "on each count" or "concurrent".

MOTION for habeas corpus.

The applicant, Edward Thomas Hastings, was detained in Liverpool Gaol, having been sentenced to four years' corrective training at Liverpool Crown Court in July, 1957. The indictment on which he was convicted contained five counts, the first of which was for larceny as a bailee, the second, third and fourth of which were for obtaining money by false pretences, and the fifth of which was for fraudulent conversion. Separate verdicts were returned on each count. In passing sentence the recorder stated that the applicant had been convicted "of deliberate, calculated and systematic frauds", and sentenced him to four years' corrective training, but he did not pass sentence separately on each count or state that concurrent terms of corrective training were being imposed. The sentence indorsed on the indictment was simply "Four years' corrective training". On appeal against conviction on the first three counts the Court of Criminal Appeal, on Dec. 18, 1957, quashed the conviction on the first count. The applicant moved the court for his release from gaol on the ground that, as no sentence had been passed on the remaining counts, his continued detention was illegal.

Marshall, Q.C., and N. McL. Butler for the applicant.

Rodger Winn and G. J. Bean for the respondent.

LORD GODDARD, C.J.: Counsel for the applicant moves in this matter for a writ of habeas corpus to bring up the body of one Edward Thomas Hastings, at present detained in Liverpool Gaol (where he is serving a sentence of four years' corrective training), with a view to his being discharged on the ground that his detention is illegal. The main ground put forward is that no sentence of the court was ever passed on him.

The circumstances which it is necessary to detail are quite short. He was tried at the Liverpool Crown Court before the learned Recorder of Liverpool last July on an indictment containing five counts. The first count was a count

of larceny as a bailee, in other words, that being a bailee he fraudulently converted the bailed goods to his own use. The second, third and fourth counts were for obtaining money by false pretences, and the fifth count was a count of fraudulent conversion. The jury found him guilty on all counts, and the learned recorder sentenced him to four years' corrective training in these words:

"You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss but have cruelly brought grave financial burdens on little men which it will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years' corrective training."

I emphasise the learned recorder's references to frauds in the plural.

The point that is made before this court is that the sentence of four years' corrective training was duly indorsed on the indictment but the indorsement did not show four years' corrective training on each of the counts, nor did the learned recorder use the words "concurrent on each count". Accordingly, counsel for the applicant in the course of a learned and clear argument has submitted that, as the Court of Criminal Appeal subsequently quashed the conviction on count 1, therefore it follows that the sentence having been passed on an indictment containing five counts, one of which has been quashed, there is nothing to show to which count the sentence is applicable. He contends that no sentence was passed on the other counts at all, therefore there has been no legal sentence passed and there is no authority for holding the applicant in gaol.

In my opinion, the question is simply one of construction. Counsel for the applicant agrees that if the word "concurrent" had been used or if the learned recorder had said "on each count" he would have no ground on which he could sustain the motion. It seems to me that it is perfectly obvious here that the learned recorder meant to pass a sentence of four years on each count of the indictment. It is to be noticed that each count of this indictment was for quite a separate and distinct offence. They were not alternative offences, they were separate and distinct offences each of which would support a sentence of four years' corrective training, as they would have sustained a sentence of four years' imprisonment, and I think one has only to see here that the learned recorder was dealing with a course of fraud and saying he is sentencing the prisoner for systematic frauds. Every one of these cases was a case of fraud. It is true that the first case was a felony and the others misdemeanours, but there is no point in that because the four convictions which stood were all convictions for fraud, and, of course, the first crime, larceny as a bailee, depends on the fraudulent conversion of the property entrusted to the bailee. If there was a bailment, then by statute the offence of larceny as a bailee can be sustained. I am clearly of opinion in this case that the intention of the learned recorder was to pass a concurrent sentence although he did not use the word "concurrent". It is not a question of the exact words that are used; it is a question of what the court considers to be the intention of the learned recorder when passing the sentence, and one can see that the learned recorder meant that on each of these counts a sentence of four years' corrective training was to be passed. That was the view which the Court of Criminal Appeal took when this matter was brought before them because the point had been raised in the notice of appeal; but the court in quashing the conviction on count 1 expressly said that they were not making any difference in the sentence because of the gravity of the crimes which had been committed by the applicant and which had formed the subject of the

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other counts. It would follow that if the point counsel for the applicant has strenuously urged on us is right, it applies equally to what the Court of Criminal Appeal said as to that which the learned recorder said in passing the sentence. PRISON, J., who gave the judgment of the court when the case was before the court on appeal, started his judgment by saying:

"In this case the appellant was convicted on five counts involving fraud in the Liverpool Crown Court, and he was sentenced on each count concurrently to a term of imprisonment. Leave to appeal was given with regard to three counts only, and leave to appeal was given only in respect of conviction. That, in fact, was all that was asked for, but in any case the actual sentence given was in our view a reasonable sentence and there would be no reason for interfering with it on any view."

Then he said at the end of his judgment:

"The conviction on the first count is quashed, in other respects the appeal fails, and there will be no alteration of sentence."

In my judgment the real question which we have to decide is: What was the true effect of the learned recorder's sentence in this case? I think it is abundantly clear that the effect of the recorder's sentence is that he intended this to be a sentence concurrent on each count. For that reason, therefore, this application fails.

I have only to say one or two more words with regard to the authorities which have been cited to us. Reference was made to the case in the House of Lords in 1844 on a writ of error, *O'Connell v. Reginam* (1). In that case there were eleven counts and five counts turned out in the opinion of the House to be defective and were quashed as bad counts. In those days the way of challenging a criminal conviction was by writ of error, and when the writ of error in *O'Connell v. R.* (1) was brought before the House of Lords it appeared that the judgment recorded was "for the offences aforesaid". The majority of their Lordships, contrary to the opinions which the learned judges who had been called on to assist the House had given, came to the conclusion that there had not been a judgment on all the counts. It is quite obvious from reading the opinions of LORD DENMAN and LORD COTTENHAM that they were very much impressed by the inconveniences that could arise in those days, but things are very different now because the matter could be easily brought before the Court of Criminal Appeal. If a case comes before the Court of Criminal Appeal in which a sentence of this sort has been pronounced, which the court thinks means concurrent sentences, and if, for instance, two or three counts of an indictment containing a large number of counts are quashed, it is always open then to the court, whether there has been an appeal against sentence or not, to say: "We, having quashed the convictions on certain counts, consider that makes such a difference that we shall reduce the sentence". That is a matter of the court exercising its discretion, but nothing was said in the House of Lords to the effect that a general sentence could not be given. The only thing is that a general sentence in those days did become defective if it was given on many counts, some of which were afterwards quashed. I do not propose to go at length into the history of the abolition of writs of error which are no longer available to a prisoner. His privileges are now given to him by the Criminal Appeal Act, 1907, and I see nothing here to force us to say that the learned recorder in passing the sentence he did was not passing a sentence on each count of the indictment. Therefore, in my opinion, the sentence of four years' corrective

(1) 11 Cl. & Fin. 155; 5 State Tr. N.S. 1.

training is applicable to counts 2, 3, 4 and 5, and accordingly this motion fails.

There are two things that I wish to add. It is common at assizes or at quarter sessions for the sentence to be pronounced in this manner, but since 1844 an appeal has not been brought before the court on that ground, although one would suppose that many prisoners would have escaped if it had been thought that the fact that the judge had omitted to use the word "concurrent" made any difference. The other thing is that this case has shown that perhaps it would always be desirable for the court to use some words like "on each count", or to say "concurrent". Although we have no difficulty in holding here that that was the learned recorder's intention, and we can get it from the use of the plural in passing sentence, we think that it would be desirable to use some such words in order to prevent this sort of question arising hereafter.

STREATFEILD, J.: I am of the same opinion, and I want to make it clear that for my part I would certainly uphold the principle which counsel for the applicant has insisted on, that a court should make it clear that it is in fact passing a sentence in respect of each count on which the accused person has been found guilty or has pleaded guilty, and in that respect the judgment of HUMPHREYS, J., in *R. v. Grubb* (1) is very much in point. At the same time, I do not think for my part that any particular form of words is necessary, if it is made clear that a sentence which is passed is in fact applicable to each count of an indictment where there has been a finding of guilt. It may be convenient that some such phrase as "on each count" or "counts numbered" so-and-so "the sentence shall be" such-and-such a term. It may be that the word "concurrently" puts that matter beyond all doubt, but provided that the meaning is clear in the passing of the sentence and made clear to the accused, no particular form of words is necessary.

In my view this case narrows down to the one question what is the proper interpretation of the words which were used by the learned recorder in passing sentence, not merely what he meant but what he actually said. I agree with my Lord that the words of the learned recorder's sentence are really perfectly clear. He is referring to an indictment which contained five counts, one of which was for larceny as a bailee and the others for frauds, three of them being false pretences and the other one fraudulent conversion. He refers throughout to those frauds in the plural. He then puts the matter beyond all argument in my view, by going on to categorise the people who have been victimised by those frauds, and he ends by saying "You will go to prison for four years' corrective training". It is to my mind perfectly obvious that the learned recorder was applying his mind to each one of those frauds. Indeed, it would seem that the word "fraud" was actually more applicable to the last four counts of the indictment than to the first one for larceny, but having regard to the "frauds" in the plural, the learned recorder made up his mind perfectly correctly in my judgment, that each count merited a sentence of corrective training, having regard to the record of the accused; so, when he proceeded to pass sentence of corrective training, the sentence must have referred to each of the frauds to which he had alluded. In my judgment, therefore, although he has not used the words "on each count" separately, or has not used the word "concurrently" it is almost too clear for argument that the totality of those words amounts to a sentence by the learned recorder of four years' corrective training in respect of each and every one of the five counts of the indictment.

(1) (1945), 109 J.P. 132.

In those circumstances, it seems to me that the remainder of counsel for the applicant's argument does not really arise, and with regard to *O'Connell v. Reginam* (1) it would seem likely, without expressing any further opinion on it, that s. 5 of the Crown Cases Act, 1848, was passed with the express purpose of getting rid of the difficulty which arose in *O'Connell v. Reginam* (1). Nowadays it would seem that those difficulties can equally well be dealt with by the Court of Criminal Appeal under either s. 4 or s. 5 of the Criminal Appeal Act, 1907. However, having come to the conclusion that I have reached as to the proper interpretation of the learned recorder's sentence, those latter matters do not arise and I found my judgment on what I believe to be the interpretation of the sentence. In my view it was the perfectly clear intention that there should be concurrent sentences on each one of the counts. For those reasons, therefore, I agree with the judgment of my Lord.

SLADE, J.: I agree. The conclusion that the learned recorder's sentence of four years' corrective training was to relate to each of the five counts of the indictment is almost irresistible from the language that he used. I am fortified in this view by asking myself the question, if that is not its true interpretation, to which one or more of the five counts did it relate? I have heard the suggestion made, as is the fact, that count 1 is a felony and counts 2 to 5 are misdemeanours, but I cannot help thinking that that suggestion is made solely because the felony was the only count quashed by the Court of Criminal Appeal. The word "frauds" in the plural which preceded the actual sentence is more appropriate to the four counts of misdemeanours than the count of larceny, though it is true that in this particular case, being larceny by a bailee, the words "fraudulently converts" appear in s. 1 (1) of the Larceny Act, 1916. I am satisfied that the only possible construction of the words used by the learned recorder is that he intended to pass a sentence of four years' corrective training on each of the five counts of the indictment.

Motion dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Keith Moore*, Birkenhead; *Treasury Solicitor*.

T.R.F.B.

(1) 11 Cl. & Fin. 155; 5 State Tr. N.S. 1.

CHANCERY DIVISION

(DANCKWERTS, J.)

March 12, 1958

LONDON COUNTY COUNCIL v. CENTRAL LAND BOARD

Town and Country Planning—Development value—Determination—Estate acquired for building purposes—Heavy expenditure to make part of land suitable—No development value for whole land—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 70.

The county council acquired an estate of 231 acres for the purpose of developing it as a housing estate. The greater part of the land was suitable for building houses, but on part of it the council had to meet heavy expenditure on site works so that the cost of those works was in excess of the value of the land as a whole for building purposes. The Central Land Board claimed £22,500 as a development charge on the footing that the permission had increased the value of the land in that the county council was at liberty to carry out the development as far as it was profitable and was under no legal obligation to develop the whole land.

HELD: the development charge had to be assessed regarding all the land in respect of which permission was granted and on the assumption that all the operations would be carried out, and, as the value of the land as a whole was not increased by the permission if all the operations were carried out, no development charge had to be paid.

ADJOURNED SUMMONS.

The plaintiff, the London County Council, by its originating summons, dated Apr. 30, 1957, asked that it might be declared on the true construction of the Town and Country Planning Act, 1947, and the Town and Country Planning (Development Charge) Regulations, 1948, that, for the purpose of determining whether any and if so what development charge was to be paid in respect of the operation to be carried out by the plaintiff on land forming the major part of the plaintiff's Sheerwater Estate at Woking pursuant to the Surrey County Council's planning permission and the Woking Urban District Council's planning permission, the defendants ought to value the said land with the benefit of the said planning permissions on the footing that the plaintiff would proceed to carry out the whole of the said operations within a reasonable time.

The Sheerwater Estate was acquired by the plaintiff under the provisions of Part 5 of the Housing Act, 1936, partly by agreement and partly in pursuance of compulsory powers conferred by the County of London (Woking, Surrey) Extension Order, 1951. The plaintiff obtained planning permission for the development of the estate from the Surrey County Council, excluding part of the industrial land, in November, 1949; the plaintiff subsequently obtained planning permission from the Woking Urban District Council (acting on behalf of the Surrey County Council) for the development of the whole of the industrial land in March, 1952. In November, 1951, the plaintiff applied to the defendants for the assessment of the development charge on the whole of the estate, excluding certain small portions which were exempt from development charge or excluded by agreement, and in consideration of an undertaking by the plaintiff to pay the development charge when determined, the defendants consented to the plaintiff's proceeding with the development before the charge was paid. The development of the estate, apart from industrial land, was substantially completed before Nov. 18, 1952.

Rowe, Q.C., and H. E. Francis for the London County Council.

Denys B. Buckley for the Central Land Board.

DANCKWERTS, J.: The dispute is between the London County Council, who acquired and developed an estate at Woking, and the Central Land Board, who claim that a development charge became payable under the provisions of the Act by virtue of the permission which was given for the development in question. The estate acquired by the London County Council was the Sheerwater Estate at Woking, having an area of 231 acres. The greater part of the land was suitable for development for building houses, but a portion of it was not so suitable, and by reason of that fact the London County Council had to incur considerable expenditure.

In his affidavit, Joseph Edward James Toole, the valuer of the London County Council, said:

"By reason of the physical condition of the land the council were compelled to incur very heavy expenditure on site works and in particular on culverting a watercourse known as the Rive Ditch which passed through the land and which took surface water from the town of Woking. In addition, the council had to make a substantial contribution to the Surrey County Council pursuant to the provisions of the Surrey County Council Acts, 1925-36, towards the cost of improving a further length of the Rive Ditch outside the boundary of the estate. The total cost of these works was considerably in excess of the value of the land as a whole for building purposes."

The council contends that as a result of that the increase in value by reason of the permission was nil. On the other hand, the board contend that £22,500 was payable. According to the statement of Mr. Toole in para. 7 of his affidavit the £22,500 was arrived at on the footing that it would be open to the board

"to assess the development charge on the basis that only those parts of the estate which an ordinary developer would consider it advantageous to develop from a commercial point of view would be developed and that those parts of the estate which would involve abnormal development costs would be left undeveloped."

That statement of the basis of the claim was contradicted by an affidavit of Mr. Stedman, district valuer of the Guildford District of the Inland Revenue Valuation Department. He says:

"I did not proceed on the footing described in para. 7 (a) of the said affidavit [which I have just read] but on the footing that a developer would be at liberty to carry out forthwith so much of the development as was for the time being profitable and to defer the remainder of the development until such time as the carrying out of that further development would be profitable."

As far as I can see, it comes to much the same thing, because it would mean that the unprofitable part would be left undeveloped indefinitely and perhaps never developed at all, and I am bound to say that I thought that the argument of counsel for the board proceeded very much on those lines.

The London County Council, in pursuance of its purpose and powers provided for in this Act, undoubtedly proceeded to develop the whole estate, notwithstanding the heavy expenditure which it had to make in respect of the less profitable part of it. The provisions which are relevant appear in Part 7 of the Town and Country Planning Act, 1947. Section 69 provides:

"(1) Subject to the provisions of this Act, there shall be paid to the Central Land Board in respect of the carrying out of any operations to which this Part of this Act applies, and in respect of any use of land to which this

Part of this Act applies, a development charge of such amount (if any) as the board may determine, and accordingly no such operations shall be carried out, and no such use shall be instituted or continued, except with the consent in writing of the Central Land Board, until the amount of the charge (if any) to be paid in respect of those operations or that use has been determined by the board in accordance with the provisions of this Part of this Act, and the board have certified that the amount so determined has been paid or secured to their satisfaction in accordance with those provisions.

"(2) This Part of this Act applies to all operations for the carrying out of which planning permission under Part 3 of this Act is required, and to all users of land for the institution or continuance of which such permission is so required."

Section 70 (1) of the Act provides:

"Subject as hereinafter provided, the Central Land Board shall, on application being made to them in the manner prescribed by regulations under this Act by a person having an interest in land sufficient to enable him to carry out any such operations as aforesaid or to make any such use as aforesaid, or by a person who satisfies them that he is able to obtain such an interest, determine whether any and if so what development charge is to be paid in respect of those operations or that use: Provided that—(a) where planning permission under Part 3 of this Act has not been granted for the carrying out of the said operations or for the institution or continuance of the said use, the board may postpone the determination of the development charge to be paid in respect thereof until such permission has been granted; (b) where the application relates to the carrying out of any operations, the board may refuse to determine the development charge payable in respect thereof unless they are satisfied, after consultation with the local planning authority, that the applicant is able to carry out those operations, and that he will do so within such period as the board consider appropriate . . ."

That seems to me an essential part of the working of the use provisions. In sub-s. (2) (which counsel for the board argued was the only provision dealing with the assessment of the value) it is provided:

"In determining whether any and if so what development charge is to be paid under this Part of this Act in respect of any operations or any use of land, the board shall have regard to the amount by which the value of the land with the benefit of planning permission for those operations or that use (calculated without regard to any charge payable in respect thereof under this Part of this Act and on the assumption that the operation or use can lawfully be carried out or made apart from the provisions of this Act) exceeds the value which it would have without the benefit of such permission, and shall not give any undue or unreasonable preference or advantage to one applicant over another."

Before turning to the regulations, I should refer to the argument of counsel on behalf of the board based on the contention that a development charge must be payable in this case on the provisions of that sub-section. He says that the London County Council will have paid for the existing site value and that by reason of the expropriation of the right to develop the land compensation would have been paid to the previous owner appropriate to the value of development rights. He says that anybody who obtains permission to develop this land will get an additional value for the right to develop that part of the land which can properly be developed without expenditure, and he contends that

there is no legal obligation on the person who applies for permission to develop anything except the land which it is profitable to develop, and, therefore, that it must be assumed that he would not develop the other land which it would be expensive to develop but which would still preserve its existing use value. Therefore, he says, a development charge was justified representing the difference between the existing use value of what I may call the good land and the value with permission to develop.

It is true that no legal obligation is cast on the applicant to develop. On the other hand, the board have to be satisfied, under the provisions of proviso (b) to s. 70 (1) not only that the applicant is able to carry out the operations, but that he will carry out such operations within such period as the board consider appropriate; otherwise the board can refuse to assess the development charge. It seems to me one operation which the board have to carry out, viz., to determine whether the applicant is a person who can be trusted to carry out the development which he proposes, and if it were not so satisfied it would be their duty to refuse to assess the development charge or to refuse permission altogether. While it may be a matter of good faith and honesty, the actual basis of the valuation to be made under s. 70 (2) is that the development the applicant proposes will be carried out, and, therefore, one has no right to assume that any part of the operation will not be carried out. It is to be observed that the value is to be based on the assumption that the operations will be carried out in regard to a particular portion, and is not merely the abstract value of the land with building or development permission. It seems to me that that makes quite a difference. One must regard the value bearing in mind the particular circumstances of the application for development which is made. Furthermore, it appears to me that "land" in this sub-section means all the land in respect of which the application for permission is made.

Having made those remarks, I now propose to pass to the regulations and to certain comments which have been issued by the board which seem to me to support the same view. The Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948 No. 1189), provide, by reg. 2:

"Subject to the provisions of the Act and of any regulations made thereunder and for the time being in force, the general principles set out in the schedule to these regulations shall be followed by the board in determining under Part 7 of the Act whether any, and if so what, development charge is to be paid thereunder in respect of any operations or use of land."

Then comes the schedule which is the most important part of the document. Paragraph 1 provides:

"Development charge shall be determined so as to secure, so far as is practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. This object is the governing principle by which the board are to be guided in determining development charge."

Paragraph 2 seems to me very important:

"Development charge shall not be more than the amount which, to the satisfaction of the board, represents the additional value, measured by normal processes of valuation, of the land due to planning permission for a particular development."

Therefore, it is plain that the "particular development" must be considered in regard to the amount of the charge. Paragraph 3 is:

"Development charge shall not be less than the amount referred to in para. 2 of this schedule, unless in the opinion of the board the charge ought properly to be less in order to comply with the governing principle."

The construction which I have put on the Act is borne out, I think, not only by the regulations, but also by certain comments which have been issued called "Practice notes, being notes on development charges" under the Act, and no doubt have been issued by the board for the assistance of persons who have to operate the Act. They have no force of law in any way, but are of interest as being the view which has been taken by the board and which counsel for the council has quite properly used as part of the argument. I do not think I need go through the notes in detail, but perhaps I may say a word about the phrases "consent value" and "refusal value". "Refusal value" means, roughly, the value without permission. "Consent value" is the enhanced value due to permission being obtained. With that preliminary observation, I turn to para. 58 which says:

"Consent value will thus be calculated on a suitable process of valuation and on the basis that:—(1) any relevant operations or uses which are not in law 'development', would be permitted to the owner. (2) any operations or uses which are mentioned in Sch. 3 and which will be available to the owner, after he has carried out the development permitted by the planning permission, would be permitted to the owner . . . (4) the particular operations or uses permitted by an actual planning permission (and subject to any conditions in such permission) will be carried out."

Then I turn to para. 93:

"The board will be prepared to assess one development charge for an unit of development of a reasonable size. For the reasons given in Note XXIX, it is important that developers should apply to the board to assess the *complete* development charge for the unit before the *first* works are carried out on the land (e.g., road works or sewers). Application on form D.1 should therefore be made before the first works are to be carried out. The board will normally (other than in very large estates) accept as the unit for fixing the development charge an area of land which is likely to comprise one continuous development comprised in one planning permission."

Applying that to the present case, it is quite obvious that the result is that the whole of the estate, i.e., the difficult portion as well as the portion which is easy to develop, is one unit for the purpose of the assessment of the development charge (if any). Paragraph 108 is:

"It will always be open to an applicant to ask that the determination of development charge should be related to a part only of the area of land (or buildings) covered by a particular planning permission. Question 6 on form D.1 is designed for this purpose. A planning permission is however given for a particular operation or change of use, and the development charge must be assessed upon the assumption that that permission will be fully operated on the area of land chosen by the applicant."

Paragraph 120 is:

"Circumstances in which, and the time at which, a determination of development charge can be made.—The amount of a development charge has to be based on values current at the time the development takes place. In addition, the consent value bears a direct relation, as the term suggests, to the planning consent. Before the board can determine a charge for a

Eng. Per.

particular development, they will require to be satisfied, not merely that the applicant (or someone acting with his authority) is able to carry out that development within a reasonable period but also that the development will in fact be so carried out."

That is a reference to s. 70 (1) (b). Paragraph 121 says:

"The following is a summary of the conditions which the board consider necessary: (a) the applicant must be able to show that the development will take place within a reasonable time. The board are not prepared to generalise on the meaning of 'reasonable' in this connexion, but they are unlikely to issue a determination if the development is improbable within one year, unless the project is a very large one; or unless other valuations are necessary (e.g., monopoly value for licensed premises) . . ."

Those comments are entirely sensible and right to the point and appear to support exactly the view which has been put forward in this case on behalf of the London County Council. The whole of the estate which the council has developed must be taken into consideration. The whole of the operations which they propose to carry out must be taken into consideration, difficult and easy altogether. It seems to me that the result of that is, as contended for on behalf of the council, that the enhanced value which they might have by virtue of permission in respect of part of the property included in the development plan is entirely wiped out by the heavy expenditure for drainage, and so on, which they have had to incur under the plan in respect of the land which required expenditure before it could be developed.

Counsel for the board argued that, if no development charge were imposed, the council would be getting the site for less than the existing use value, but that seems to me to be based on a misapprehension. There is no doubt that the council has had to pay for the site, and I suppose that the amount paid would be in accordance with the use value. There is no doubt that the amount which it had to spend on the development of the land is money which is borne out of the moneys of the council or its ratepayers. It is true that the board have presumably paid out something to the previous owner in respect of the development value of the property, or in respect presumably of the property which was available for development, and, if there is no development charge to be exacted, they will not get back that money paid out of the Exchequer. But that does not seem to me to alter the situation. It appears to me that it is quite irrelevant. What one has to consider is what is the increase in value to the council by virtue of the permission to carry out the operations which it proposes, and nothing else. It seems to me that the result is nil, because of the heavy expenditure which it has had to make on a part of the estate which it was intending to develop. Consequently, I think that the contention on behalf of the council should succeed on this application.

Declaration accordingly.

Solicitors: *Solicitor, London County Council; Treasury Solicitor.*

F.G.

QUEEN'S BENCH DIVISION

(DONOVAN, J.)

March 25, 28, 1958

HAMILTON AND ANOTHER *v.* WEST SUSSEX COUNTY COUNCIL
AND ANOTHER

Town and Country Planning—Permission for development—Outline permission—Design and siting reserved for subsequent approval—Subsequent application for approval on reserved matters refused on ground that development contrary to planning authority's proposals for the area—Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950 No. 728), art. 5 (2).

In 1955 an applicant applied, under the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, art. 5 (2), for outline planning permission to erect a replacement cottage on a farm. Outline planning permission was granted subject to the approval of the local planning authority of certain matters, viz., the design and siting of the cottage. Under art. 5 (2), proviso (i), approval had to be obtained before the development was begun, and a limit of two years for obtaining approval was fixed in the outline permission. In 1956 the applicant applied for the necessary approval, but the application was refused on the ground that the development was contrary to the planning proposals for the area. The applicant claimed a declaration, *inter alia*, that the outline permission was a good and valid permission within the Town and Country Planning Act, 1947, and entitled her to proceed with the erection of the cottage. The local planning authority conceded that, unless the 1956 application could be regarded as a fresh application, their reasons for withholding planning permission on that application were wrong. The court inferred as a fact that the local planning authority had considered the matters reserved in the 1955 outline permission when the 1956 application was considered and found nothing to which they objected.

HELD: the outline planning permission had become a good and valid planning permission, and the local planning authority, therefore, could not properly withhold approval.

ACTION by Audrey Joyce Hamilton, a widow, the first plaintiff, and the Rowland Hill Permanent Building Society, the second plaintiff, for a declaration that an outline planning permission was a good and valid permission under the Town and Country Planning Act, 1947. The outline permission was granted to Mr. Donald Hamilton, on behalf of the first plaintiff, by Chichester Rural District Council, the second defendants, who were acting under powers delegated to them under the Act of 1947 by the local planning authority, West Sussex County Council, the first defendants.

The first plaintiff was the owner in fee simple of land known as Courts Farm, West Wittering, in the county of Sussex, and the second plaintiff was the mortgagee of Courts Farm under a legal charge dated Dec. 8, 1955. By a written application dated Feb. 12, 1955, made on the appropriate form issued by the first defendants, Mr. Hamilton, on behalf of the first plaintiff, applied to the second defendants for planning permission to develop Courts Farm by the "conversion of two old cottages into one sound ditto and erection of one replacement cottage". The application stated that the area of land to which it related was "Part of approximately forty acres" and that the application did not involve making any new access to a road. A plan was attached to the application marked "lay-out of cottages, gardens and orchards proposed at Courts Farm House, West Wittering", from which it appeared that the plot of land on which it was proposed to build the new cottage was some distance away from the site of the two old cottages; there was no evidence to indicate that the proposed

plot for the new cottage was contained in its own curtilage. The application was described, and was accepted by the second defendants, as an outline application for planning permission (see art. 5 (2) of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950).

In a letter covering the application dated Feb. 14, 1955, addressed to the second defendants, Mr. Hamilton wrote:

"Courts Farm, West Wittering. I enclose herewith plan showing the ultimate lay-out of the above which as you will see is being treated as an orchard farm. Further fields will possibly be laid down in due course particularly to the south of the estate. There are two cottages at the present time empty at the position marked 'A' on the town planning application plan enclosed, which are in poor order. I am proposing to turn these two cottages into one first-class ditto and to build a replacement at the position marked 'B'... Although it is not a subject of this application, at a later date I hope to be able to allow the villagers of West Wittering to play cricket on the field shown on the lay-out plan. Would you be good enough to inform me whether in broad principle there would be any objection to the cricket pavilion where shown on the plan. This request is not a formal one and is merely to indicate to me whether there is likely to be any objection. I am most anxious that the whole character of this section of West Wittering shall remain broadly as it is and am taking such steps that are within my power to provide the maximum possible protection and improvements."

In a written permission for development dated Apr. 27, 1955, the second defendants, having first stated therein that the proposal for development concerned was an "outline application for cottage—Courts Farm, West Wittering, Sussex", stated that they permitted the development proposed by Mr. Hamilton "as quoted above" subject, *inter alia*, to its being carried out in accordance with detailed drawings and written particulars approved by the second defendants, and to any departure from the approved proposals being made the subject of a fresh application. The written permission was stated to be subject to the following further conditions:

"(1) The permission hereby granted is an outline permission under [art.] 5 (2) of the Town and Country Planning General Development Order, 1950, and the approval of the local planning authority is required in respect of matters reserved in this permission before any development is commenced.

"(2) The permission shall become null and void unless satisfactory plans and elevations giving details of the design and siting of the building, are submitted to and approved by the local planning authority within two years of the date hereof."

By a further application for planning permission, dated Oct. 17, 1956 (referred to hereinafter as "the 1956 application"), made on behalf of the second plaintiff, permission to erect a cottage and garage at Courts Farm was sought, and detailed plans, including plans marked "lay-out plan" "block plan" showing the siting and design of the cottage, were submitted with the application. On these plans, the site of the proposed cottage differed from the site of the "new replacement cottage" shown on the plan which had accompanied the outline application dated Feb. 12, 1955. The 1956 application stated that the area of land to which it related was 3.21 acres and that the development involved a vehicular access to the proposed new garage which was to lead from a private

roadway. By a written refusal of permission to develop dated Nov. 19, 1956, the second defendants refused permission for the erection of the cottage and garage, giving as their reason, that the development was contrary to the planning proposals for the area, but they did not raise any objection to the detailed plans submitted with the 1956 application although the application was considered by the same officers as considered the outline application made in February, 1955, and the documents relating to the outline application, which was granted subject to the second defendants' approval of detailed plans, were in front of those officers. By a form of appeal dated Jan. 28, 1957, the second plaintiff appealed to the Minister of Housing and Local Government against the second defendants' refusal of planning permission, but, subsequently, the Minister decided that he would not hold an inquiry into the appeal until the present proceedings were concluded.

The second plaintiff claimed to have relied on the outline planning permission in granting an advance to the first plaintiff, and both plaintiffs now claimed (i) a declaration that as a necessary inference from the reasons stated in the refusal of planning permission dated Nov. 19, 1956, the defendants were deemed to have approved the plans and elevations submitted with the 1956 application, and (ii) a declaration that the outline permission dated Apr. 27, 1955, was a good and valid permission within the Town and Country Planning Act, 1947, which entitled the plaintiffs to proceed with the erection of the cottage and garage.

The defendants contended that the proposal contained in the 1956 application departed from the proposal approved in the outline permission granted in April, 1955, because of the different siting of the cottage in the plans submitted with the 1956 application and the fact that the two old cottages proposed to be made into one in the outline application, had not been so converted and were not referred to in the 1956 application; the 1956 application therefore constituted a new proposal for development and the second defendants had considered it on its merits, and refused it. Further, the defendants denied that detailed plans of the design and siting of the cottage had been submitted to or approved by the local planning authority in accordance with the conditions attached to the outline permission. The plaintiffs denied that the 1956 application constituted a fresh proposal for development, and alleged that the outline permission was for the erection of one cottage on the area of land mentioned in the outline application, that the 1956 application was for the erection of a cottage on the same area of land, within the outline permission, and that the siting of the cottage within that area was one of the matters which was expressly reserved by the conditions attached to the outline permission.

L. A. Blundell for the plaintiffs.

N. C. Bridge for the defendants.

Cur. adv. vult.

Mar. 28. **DONOVAN, J.**, read the following judgment: The first issue in this case is the identity of the land in respect of which the outline application was made on behalf of the first plaintiff in February, 1955. She says that it was Courts Farm, West Wittering, as shown on the plan accompanying the application. Both defendants say it is only a very small part of that farm as so shown, namely, a small plot on which the proposed new cottage was to be erected. I will call this for brevity "the small plot".

The importance of the issue is this. If the land the subject of the outline application were Courts Farm, the defendants admit that the reasons given for refusing the further application for planning permission made in October, 1956

(hereinafter called the 1956 application), are wrong and cannot be sustained. The 1956 application was submitted on behalf of the second named plaintiff consequent on the grant of outline permission to the first plaintiff, and it comprised the detailed drawings called for by the terms of the outline permission. If on the other hand the land the subject of the outline application were the small plot alone, then the reasons given for the refusal of the 1956 application were not wrong. The reason is that the new cottage was shown in the 1956 application as sited on a different portion of Courts Farm, so that the 1956 application would, on the above hypothesis, be a new application in respect of different land.

Under the Town and Country Planning Act, 1947, and the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (hereinafter called "the Order of 1950"), it is for the person who wishes to develop land to make application for planning permission; and under art. 5 (1) of the Order of 1950 it is for him to indicate what land it is that he wishes to develop. He must do this by means of particulars and a plan. The particulars are to be those required by a form to be issued by the local planning authority, and the plan is to be sufficient to identify the land.

[His LORDSHIP considered the outline application, the plans and correspondence, and continued:] In all the circumstances it seems to me quite clear that the land the subject of the outline application and of the grant of outline permission was Courts Farm and not the small plot.

The defendants then raise a further point, also designed to show that the 1956 application was really a new application altogether. They say that on the plan submitted for outline permission a form of access from the proposed cottage to a road was shown, whereas on the final plans a different form of such access is shown. It is said that this alone makes the 1956 application a new one, and art. 5 (2) of the Order of 1950 is relied on in this connexion. The point is not foreshadowed in the defence, at least with any particularity, but no objection was raised on this score on behalf of the plaintiffs. The defendants, however, in their outline permission of 1955 made no reservations whatever on the subject of access. Moreover in any event, as the plaintiffs say without contradiction, the new access merely connects with the same road at a different point, and the road itself is a private road on the farm and not a public road at all. Obviously where a public road is concerned, matters of access from new buildings concern the planning authority very much; but they hardly do so where the access is simply to a private road on the same land, and I do not think that art. 5 (2) of the Order of 1950 has any application to such a road. It may be that the planning authority took the same view originally, and that this explains why no reservation whatsoever on the subject-matter of access was made when outline permission was granted. In any event I think that the point is without substance for the reason that I have given.

The defendants concede that if they fail in their contention that the 1956 application was really a fresh application altogether, then their reasons for withholding planning permission were misconceived and wrong. What follows, it is said, is this; that they have never considered the right question, namely, whether the matters reserved in the outline permission have been satisfactorily arranged, and that, therefore, they should now be given the opportunity of considering whether this is so.

The matter needs careful consideration, first, because of the extra burden involved for the plaintiffs, who have proceeded quite correctly throughout, and, secondly, because the two years, specified in the outline permission as the time within which detailed plans had to be approved, have now expired. The defen-

dants say that they would not take any point on this in the circumstances, seeing that the plans were submitted in time, but this very proper attitude does not of itself confer jurisdiction. When the detailed plans called for by the outline permission were submitted with the 1956 application one of two things happened: either the reserved matters, such as design and siting, were not considered at all, because the defendants decided to reject the application on principle; or they were considered and while the defendants found them unobjectionable they nevertheless decided to reject the application, again on principle. Which of these two things occurred it would have been quite easy for the defendants to prove, but no one went into the witness-box on their behalf, and I am thus left to draw a conclusion from the facts revealed by the documents before me. They are these. (i) The same officers who considered the outline application considered also the 1956 application. (ii) With that latter application the second plaintiff submitted plans and elevations giving details of design and siting of the cottage pursuant to the conditions contained in the outline permission. (iii) The previous documents relating to the outline permission were in front of the aforesaid officers when they considered these plans and elevations. They must have known, therefore, that what they were being asked to do was to say whether they approved them pursuant to the aforesaid conditions. The case is not one where the officers concerned for the planning authority inadvertently overlooked the previous grant of outline permission subject to conditions. They had this outline permission and its conditions well in mind at the time. (iv) The defendants say in their defence that they considered the application on its merits and decided to refuse. In these circumstances art. 5 (9) (a) of the Order of 1950 imposed on the defendants the obligation to state their reasons in writing, which means all their reasons and not some, and the reason given was simply that the development proposed was contrary to the planning proposals for the area. (v) From start to finish no objection has ever been raised to the design or siting of the cottage, or to the details as shown on the plan submitted with the application of October, 1956. The defendants in their defence refer to the different siting of the cottage not as something that still awaits approval but simply as a fact supporting the argument that the application of October, 1956, was a new application altogether.

On these facts I draw the conclusion that the defendants, when the 1956 application was before them, did consider through their officers those matters which had been reserved in the 1955 outline permission—as, indeed, was their duty—and found nothing to which they wished to object. The attitude which they took was that though the applicant's proposals were unobjectionable with regard to reserved matters, the work of converting the two old cottages into one had not been done and that this entitled them to consider the whole matter afresh and to refuse permission on grounds of principle. As soon as the defendants came into court this claim was abandoned. They are not now entitled to consider the reserved matters a second time. It is true that they have not formally said, "We approve", but there is nothing which obliges them to use any such particular expression. If they could find no objection after examining the applicant's proposals they could not properly withhold approval.

In these circumstances I grant the second declaration asked for by the plaintiffs, which seems to me to cover the whole matter.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Lees & Co.*

G.A.K.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., DONOVAN AND HAVERS, JJ.)

R. v. WALLWORK

April 2, 1958

Criminal Law—Indictment—Place—“In the county of S. or elsewhere”—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 3, sch. I, r. 9—Evidence—Power of judge to call witness—Complaint—No evidence by complainant herself—Evidence by another witness.

On a charge of incest with the appellant's daughter aged five, the particulars of offence charged the offence as having been committed “in the county of Sussex or elsewhere.”

HELD: that, incest being an offence wherever in England it was committed, the words naming the place of the offence were surplusage and did not affect the validity of the indictment.

At the trial the child was placed in the witness-box by the prosecution, but was unable to give any evidence. Evidence by the child's grandmother of a complaint made to her by the child, in which she named the appellant as her assailant, was admitted. The appellant, after being for some days with the child, had left her in her grandmother's house, where also the child's step-grandfather was, and some hours later the child was examined by a doctor, who found that there had been sexual interference with her. In opening the case for the defence counsel referred to the possibility of the offence having been committed by the child's step-grandfather. The prosecution had not called the step-grandfather as a witness, and the judge, after expressing the view that it would have been desirable for his evidence to be heard, decided that he himself had no power to call the step-grandfather as a witness at that stage of the trial. The jury convicted the appellant.

HELD: (i) the judge could have called the step-grandfather himself, as a judge has power to call a witness who he thinks can throw light on the case even after the close of the case for the prosecution; (ii) it is undesirable that a child as young as five should be called as a witness; (iii) the basis of the admissibility of a recent complaint being that it goes to show consistency of the complainant's story and conduct, such complaint is inadmissible where the complainant herself has given no evidence. In the circumstances, however, the court would apply the proviso to s. 4 (1) of the Criminal Appeal, 1907, and dismiss the appeal.

APPEAL against conviction.

The appellant was convicted at Sussex Assizes before PAULL, J., of incest with his daughter aged five and was sentenced to seven years' imprisonment. The indictment charged the offence as having been committed “in the county of Sussex or elsewhere.” The girl had been living with her grandmother at Woking, Surrey. On June 8, 1957, the appellant took her away for a holiday, and she slept in his bed at Littlehampton, Sussex, on June 8, 9 and 10. About 6 p.m. on June 11 the appellant returned her to her grandmother and about midnight she was examined by a doctor, who found that there had been sexual interference with her. Between 6 and 12 on that evening the girl's step-grandfather had been present in the house with the girl and her grandmother. The step-grandfather was not called as a witness for the prosecution. In his opening speech defending counsel suggested that the step-grandfather might have committed the offence. The judge took the view that, though it would have been desirable for evidence from the step-grandfather to be heard, at that stage of the case he himself could not call him as a witness. The child had been put in the witness-box by the prosecution, but was unable to give any evidence, but evidence by her grandmother of a complaint by the child, in which she named the appellant as her assailant, was admitted in evidence.

Harold Brown, Q.C., and Curtis-Raleigh for the appellant.

Royle for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before **PAULL, J.**, at the autumn assizes for Sussex of the offence of incest with his daughter, aged five. He appeals to this court against his conviction, and a variety of points are taken on his behalf. Some of the points, no doubt, raise questions of difficulty; others do not raise any difficulty at all, and I will deal with those first.

A point is taken which, if good, would go to the root of the case, namely, that the indictment was bad on its face. The indictment is in these terms: "Sussex Autumn Assizes. William Evans Wallwork is charged with the following offence:—Statement of offence: Incest, contrary to s. 10 (1) of the Sexual Offences Act, 1956. Particulars of offence: William Evans Wallwork, being a man, on a day unknown between June 7 and 12, 1957, in the county of Sussex or elsewhere had sexual intercourse with Ann Marie Wallwork, a girl of the age of five years who is, and whom he then knew to be, his daughter." The main objection which is taken, as I understand it, is that the words "in the county of Sussex or elsewhere" are inserted, whereas as a general rule one venue alone is inserted. Whatever might have been the law—and I need not go into it—before the Indictments Act, 1915, the matter is now entirely governed by that Act. One of the objects of that Act was to do away with various technicalities which had no bearing on the case and did not cause the prisoner any embarrassment or difficulty. Section 3 of the Indictments Act provides:

"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

There can be no doubt here that this indictment contains a statement of a specific offence, namely, incest on a day which cannot be exactly named, but a day between June 7 and 12. The importance of those dates is that after the 7th, namely, from June 8 to 11, the child was in the care and control of the appellant.

The only other point in the Act to which I need call attention is that it is provided in r. 9 of sched. 1:

"Subject to any other provisions of these rules, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act, or omission referred to."

So far as place is concerned, I think counsel's point is a good one—that incest is an offence wherever it is committed, and it matters not whether it is committed in one place or another, provided the prisoner knows the substance of the charge against him. It makes no difference whether the incest in this case was committed in Sussex or Surrey or any other place. It is not intended by this single count to charge him with more than one offence of incest, and the words "county of Sussex or elsewhere" in the opinion of the court are surplusage. It would have been a perfectly good indictment to charge him with the offence if the words "in the county of Sussex or elsewhere" had been omitted, and there is no pretence for saying that he did not know the nature of the offence with which he was being charged. He had been before the magistrates and committed for trial to the Lewes Assizes. There are cases, as counsel pointed out, in which it is necessary to indicate a particular place in the indictment, and an illustration which he gave was the offence of larceny on a ship which

was at the time of the larceny in a harbour or in a creek or other place of anchorage—I do not use the exact terms of the section—where it would be necessary to show that the theft took place while the ship was in a harbour or some particular creek, and then it would be necessary to mention the name of the harbour or creek. But the rule which I have just read contains the words “to which it is necessary to refer in any indictment” and, in the opinion of the court, it is not necessary to refer to any place in the indictment in an offence of this description. Therefore, that objection fails. We think the indictment is a good one, though those words might well have been omitted, and I think it would be right to omit them if there was no real doubt where the offence took place. I may add that the reason why the venue is good as laid in those words is because it was proved that between the dates mentioned in the count the child had been with her father first at Woking, where he lived, then at Littlehampton where he took her, and then again at Woking where she was returned to her grandmother where she was living at the time. The appellant took her on June 8, and it matters not whether the offence was committed at one place or another so far as the charge is concerned. We think that those words “in the county of Sussex or elsewhere” were surplusage.

Before I come to the difficult point in the case, I will deal with two or three other matters which were argued before us. During the course of the trial a question arose when counsel who defended the appellant, when opening the defence, stated to the jury that he was bound to ask them to consider whether or not the grandmother with whom the child was living was a party to or knew anything about the injury from which the child had suffered. [His LORDSHIP stated the facts, and continued.] Counsel said that he was bound to suggest that there were other people, namely, the grandmother or the step-grandfather, who might have interfered with the child. Thereupon, the learned judge intervened to say that that had never been put to the grandmother, when she was in the box. It turned out in the end after the shorthand writer was appealed to that counsel had put that matter to the grandmother.

Then arose another unfortunate incident. The learned judge seemed to think that it was highly desirable that the grandfather should have been called. The grandmother had given evidence and she had said in the clearest possible terms that the child was never out of her sight from the time when her father brought her back to the time when she took her to the doctor, and that any injury from which the child suffered was not suffered while she was in her care after she was brought back by the appellant, the inference being that any injury she suffered must have been suffered before she was brought back. The grandmother was perfectly clear about that, but the prosecution had not called the grandfather, and I suppose if they had realised that this defence was going to be raised or suggested they might have done so. The learned judge took the view, and I think learned counsel took the view, that, as the case for the prosecution had been closed, further witnesses could not be called for the prosecution, and, in our view, they could not have been called for the prosecution unless after the case for the defence some point had arisen which took the prosecution by surprise, when, according to the decided cases, evidence in rebuttal could have been given. The learned judge took the view that he could not call the witness. With all respect to the learned judge, this court does not take that view. This court takes the view that in a criminal trial—and I emphasise a criminal trial because it is different in civil proceedings—if the presiding judge, whether he is a judge of assize or chairman of quarter sessions, is of opinion that some person ought to be called who can throw material light on the subject, in his discretion he may call him and examine him himself. However, that

was not done, but another very long discussion took place partly in the absence and partly in the presence of the jury, and the learned judge did comment on the fact and told the jury that it was, perhaps, unfortunate that the grandfather had not been called and, as he put it, could not now be called. At the same time the court cannot see that this was a matter prejudicial to the appellant because it enabled the defence to say, as no doubt was said by learned counsel with considerable force: "You have to be satisfied beyond reasonable doubt that this man committed this offence, and there is another person who might have committed the offence, because there is a man who has not been called." Against that the jury would be entitled to weigh up the evidence given by the grandmother that she, a woman anxious to retain the child, had actually had the child under her eye all the time since the child came back with the appellant, and that nothing whatever had happened to the child while she was there in the house. It does strain one's credulity to think that any jury could imagine that the grandmother or the grandfather, when the grandmother was in the house, could possibly have been a party to the mutilation of this little creature especially as the one thing about which the grandmother was anxious was to retain custody of the child. We do not think in those circumstances, although it is, perhaps, unfortunate that there were such long discussions either in the presence or absence of the jury, that it was prejudicial to the appellant, and, therefore, we pay no attention to that part of the case.

We now come to the point which has given the court considerable difficulty. The child was called as a witness, but said nothing. The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be unfortunate that she was called, and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could. Of course, the child could not be sworn. There must be corroborative evidence if a child of tender years and too young to understand the nature of an oath is called, but in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again. In the course of the case the grandmother, giving evidence, stated in answer to a question that the child made this complaint, and that the child was whimpering. It was after the appellant had left that the child said, according to the grandmother, "Daddy hurt my botty and my privates and made me bleed" and, as I have already said, the child was bleeding when she was taken to the doctor. That evidence was given without objection being taken, but we do not pay any attention to that fact. First, in our opinion in this particular case that evidence was not admissible. In cases of rape or indecent assault it has always been held that the evidence of a complaint and the terms of the complaint may be given, but they may be given only for a particular purpose, not as evidence of the fact complained of, because the fact that the woman says not on oath: "So-and-so assaulted me" cannot be evidence against the prisoner that the assault did take place. The evidence may be and is tendered for the purpose of showing consistency in her conduct and consistency with the evidence she has given in the box. It is material, for instance, where a question of identity is concerned, that the complainant made an immediate complaint or a complaint as soon as she had a reasonable opportunity of making it and made the complaint against the particular man. It is also material, and most material, very often on the point whether the girl or woman was a consenting party. None of these matters arises in this case. The child had given no evidence because when the poor little thing was put into the witness-box, she said nothing and could not remember

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anything. The learned judge had expressly told the jury to disregard her evidence altogether. Therefore, there was no evidence given by her with regard to which it was necessary to say what she had said to her grandmother was consistent with the evidence she had given in the box; nor could there be any question of the identity of the prisoner or any question of consent. The learned judge, having once admitted that evidence ought—and he omitted to do this—to have told the jury that it was no evidence of the facts complained of by the child. He not only did not do that, but he also referred to the evidence in his summing-up. In some cases that might be of the very greatest possible importance, but in this particular case let us analyse the matter carefully for a minute. There would have been no objection to the grandmother saying: "The little girl made a complaint to me" and she could have been asked: "In consequence of that complaint what did you do?"—and the answer would have been "I took her to the doctor and later to the police." One realises that, although the terms of the child's statement must not be given, any jury could see at once that as a consequence of the complaint the grandmother took the child to the doctor and the police and that the terms of the complaint would mention her father. So there is really a certain artificiality about this rule that, although the statement which a girl or woman makes in these circumstances is not evidence of the facts complained of, at any rate it shows the jury at the time whether the name of the prisoner is mentioned or is not mentioned, for what happens is that the police go to a particular man and that is because the girl or woman has mentioned the name. Nevertheless, the evidence ought not to have been given and the learned judge ought to have told the jury to disregard it. It was not evidence against the appellant of the facts on which the complaint was founded, and therefore we are bound to say that there was a wrongful admission of evidence in this case.

Now comes the most difficult part of the case and a part which has given the court a great deal of anxiety, and that is whether or not we should apply the proviso. Section 4 (1) of the Criminal Appeal Act, 1907, provides: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." We have taken note of LORD SIMON's speech in *Stirland v. Director of Public Prosecutions* (1) and certain other cases, including *R. v. Haddy* (2), which was referred to with approval in the noble Lord's speech, and we have directed ourselves in accordance with the authorities which we took the opportunity of reading so that we might have them in our minds, and we know the principles, therefore, which we are to apply. In many cases if a piece of inadmissible evidence is given in a sexual case or if the jury do not receive proper direction with regard to a complaint made by a girl mentioning a man's name, it might be a most serious matter, but this case in many respects is different from the ordinary case of this sort. This is no case of a girl or a woman coming to a friend or a policeman and saying: "So-and-so has assaulted me." This is a case of a little child who has been entrusted by her grandmother in whose custody—I do not say legal custody, because we have not heard about that—but, at any rate, in whose care the child was living up to June 8, to her father, and the father was in charge of that child from June 8 to June 11, and no one suggests for one moment that the child's body was in any respect injured or damaged at the time when the child was given to her father on June 8. We know that that child was sleeping in her father's bed, but considering her age

(1) 109 J.P. 1; [1944] 2 All E.R. 13; [1944] A.C. 315.

(2) 103 J.P. 151; [1944] 1 All E.R. 319; [1944] K.B. 442.

that would not of itself call for comment, and that he took her down to Little-hampton and again she slept in his bed there, and that the child was brought back to the house before she returned to her grandmother, and I think a night was spent there. Then the child is found to be suffering in this shocking manner which showed that she had been violated. How did that happen? Who could have been responsible for that act? It seems to the court that the dilemma is complete. It was either the appellant in whose care that child had been from the time when she left the grandmother's house till the time when she was returned to the grandmother or it was the grandmother or someone in the grandmother's house who between six o'clock in the evening when that child was returned and the time she was taken to the doctor committed the offence. That is not all. The most serious evidence and the evidence most prejudicial to the appellant was that not only were the appellant's pyjamas which he was wearing at the time when he was with this child stained with semen, but the child's own knickers which were brought back were found to be stained with semen. The only possible explanation which the appellant gave as to how the child's knickers became stained with semen was that he was subject to nocturnal emissions and must have taken the child's knickers when they were lying about somewhere in the room and wiped himself with them, an explanation which I confess I am not surprised did not convey conviction to anyone.

Accordingly, this court thinks, as I have already emphasised, that the jury could if they had disbelieved the grandmother have refused to convict this man. We cannot think that the mere fact that the grandmother gave evidence that the child mentioned the appellant's name could really have had any effect on the jury at all or that the position would have been different if the name had not been mentioned, when it was shown that as soon as the child made a complaint her grandmother took her straight to the doctor and then to the police and the police went straight to the appellant. The grandmother was obviously very much attached to her little granddaughter and wanted to keep her. It seems to the court that it is impossible to conceive for a moment that she could have been guilty of mutilating this child in the manner described with some instrument. There is no real suggestion that could be made against the old step-grandfather who did not appear in the case. It was perhaps unfortunate that the prosecution did not call him, because it gave a handle to the defence to say that a person who might conceivably have had something to do with this case had not been called, but there was the grandmother's evidence that this child had never left her sight from the time when she was brought there to the time when she was taken to the doctor.

For these reasons the court is of the opinion that the points raised show that there were irregularities, but we dismiss the appeal because we are convinced that no substantial miscarriage of justice was caused.

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal; Director of Public Prosecutions.

T.R.F.B.

CHANCERY DIVISION

(UPJOHN, J.)

April 18, 1958

Re HAMILTON-SNOWBALL'S CONVEYANCE

Requisition—Compensation—Right to compensation—Sale of requisitioned property—De-requisition before completion—Compensation (Defence) Act, 1939 (2 and 3 Geo. 6, c. 75), s. 2 (3).

On Jan. 26, 1956, the vendor agreed to sell to the purchaser freehold property described in the contract of sale as 77 Glendale Avenue, Edgware. At the date of the contract the property was requisitioned by the local authority under emergency powers. It became de-requisitioned on Feb. 6, 1956, and on Feb. 23, 1956, the vendor conveyed the property to the purchaser. Compensation for dilapidation during the requisitioning period became due at the end of that period, i.e., Feb. 6, 1956. By s. 2 (3) of the Compensation (Defence) Act, 1939, compensation shall be paid to the person who is at the end of the requisition period the "owner of the land." By s. 17 (1) "owner" is defined as "the person . . . who would receive the rackrent of the land if it were let at a rackrent". The purchaser claimed the compensation money on the ground that, although the vendor was the owner at the relevant date and could give a valid discharge to the local authority for the receipt of the money, he obtained it as his trustee.

HELD: the vendor, as owner, was entitled to receive the money and to retain it, there being no provisions in the contract of sale to make him a constructive trustee for the purchaser of that money.

ADJOURNED SUMMONS.

By her originating summons taken out under the Law of Property Act, 1925, s. 49, the applicant, the purchaser of No. 77, Glendale Avenue, Edgware, claimed declarations (i) that she was entitled to be paid by the Hendon Borough Council the sum which the said council was willing to pay for compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (b), in respect of the requisitioning of the said property under war-time emergency powers, viz., £236 with surveyors' fees amounting to £12 7s. 9d. making in all the sum of £248 7s. 9d.; and (ii) that the vendor was a trustee for the purchaser of all moneys which he might be entitled to claim from the said council by way of compensation under s. 2 (1) (b) of the said Act in respect of the requisitioning of the said premises. The applicant also claimed an order that the vendor authorise the said council to pay to the purchaser all the moneys which might be due to the owner of the said premises as compensation as aforesaid.

L. A. Blundell for the applicant, the purchaser.

W. G. H. Cook for the respondent, the vendor.

UPJOHN, J.: This is a vendor and purchaser summons under the Law of Property Act, 1925, s. 49, for the determination of the interesting question which has arisen between the applicant, the purchaser of certain premises, and the respondent, the vendor of those premises, as to which of them is entitled to certain compensation moneys payable after the date of the contract, but before completion, under the provisions of the Compensation (Defence) Act, 1939.

Premises known as No. 77, Glendale Avenue, Edgware, had been requisitioned, and for many years had been in the occupation of the respondent, Mr. George Hamilton-Snowball. On Jan. 26, 1956, he entered into a contract with the then owners to purchase the premises at a price of £2,100, completion to be on or before Feb. 26, 1956. The property was sold expressly subject to the requisitioning of the property by the Hendon Borough Council and the occupation of the property by the respondent. On the same day (but presumably subsequently) the respondent sold the premises to the applicant in this summons.

The agreement for sale to the applicant provides:

"The vendor will sell and the purchaser will purchase the freehold property described in the schedule hereto at the price of £3,550."

Then the agreement provides for the payment of a deposit. Clause 2 of the agreement provides:

"The property is sold subject to the conditions following and to the conditions known as the National Conditions of Sale 16th Edn. (except conditions 13 and 16 (3)) so far as such national conditions are not inconsistent with the conditions following and are applicable to a sale by private treaty."

The schedule merely sets out a full description of the property No. 77, Glendale Avenue, Edgware. It is to be observed that there were no conditions in this contract that the property was sold subject to the occupation of the respondent or subject to requisition. That was so for the reason, which is common ground between the parties, that where premises, occupied under requisition, are purchased by the occupier, derequisitioning will shortly afterwards follow; and indeed the premises were derequisitioned on Feb. 6, 1956. Before that, however, the premises had been conveyed on Feb. 3, 1956, by the original owners to the respondent. I need not refer to the terms of that conveyance for nothing turns on them. At the date of derequisitioning, therefore, it followed that the respondent was the owner at law of the premises, but he had already contracted to sell them to the applicant and on Feb. 23, 1956, he conveyed the legal title to the applicant who thereupon entered into possession and occupation of the premises.

Pursuant to the provisions of the Compensation (Defence) Act, 1939, to which I shall refer in a moment, a claim was made by the applicant for compensation and the Hendon Borough Council, which is the local authority responsible, is willing to pay £236 plus £12 7s. 9d. fees as compensation under s. 2 (1) (b) of that Act. It is in dispute whether at the date of the transaction which I have mentioned at the beginning of 1956 the premises were dilapidated or not, but, in my opinion, that is really irrelevant. A sum of compensation had been agreed to be due and the sole question is who is entitled to that sum. I understand that the local authority has given an undertaking to abide by my decision, and for that reason, quite properly, it was not made a party.

I now turn to the relevant provisions of the Compensation (Defence) Act, 1939. Section 1 (1) provides:

"Where, in the exercise of emergency powers during the period beginning with Aug. 24, 1939, and ending with such day as His Majesty may by Order in Council declare to be the day on which the emergency came to an end,—(a) possession of any land has been taken on behalf of His Majesty . . . then, subject to the following provisions of this Act, compensation assessed in accordance with those provisions shall be paid, out of moneys provided by Parliament, in respect of the taking possession of the land, the requisition or acquisition of the property, or the doing of the work, as the case may be."

Section 2 (1) provides:

"The compensation payable under this Act in respect of the taking possession of any land shall be the aggregate of the following sums, that is to say . . . (b) a sum equal to the cost of making good any damage to the land which may have occurred during the period for which possession thereof is so retained (except in so far as the damage has been made good during that period by a person acting on behalf of His Majesty), no account being taken of fair wear and tear or of damage caused by war operations."

It is under para. (b) that the compensation of £248 has been agreed to be payable. Section 2 (3) deals with the compensation payable under para. (b) of s. 2 (1) and is in these terms:

"Any compensation under para. (b) of sub-s. (1) of this section shall accrue due at the end of the period for which possession of the land is retained in the exercise of emergency powers, and shall be paid to the person who is then the owner of the land."

Pausing there, it is therefore clear that the compensation money is payable to the person who on Feb. 6, 1956, was properly described as the owner of the land.

"Owner" is defined in s. 17 (1):

"'owner' means—(a) in relation to land, the person who is receiving the rackrent of the land, whether on his own account or as agent or trustee for any other person, or who would so receive the rackrent of the land if it were let at a rackrent."

Counsel for the applicant concedes that, having regard to condition No. 5 of the National Conditions of Sale, the respondent is, within the definition I have read, the owner who is entitled to give a good discharge to the local authority, for he was the person who on Feb. 6, 1956, would be entitled to receive the rackrent of the land if it were let at a rackrent because that was before the date of completion. Counsel for the applicant submits that, although the respondent was entitled to give a good receipt so far as the local authority is concerned, he in law holds that compensation money as trustee for the applicant. He submits that, having regard to the general law applicable as between vendor and purchaser, the respondent is a trustee of the property contracted to be sold and trustee of all the accretions thereto that may happen to arise between the date of the contract and the date of completion; e.g., timber that may fall, minerals that may be dug otherwise than under some pre-existing contract, and there may be various other accretions. He submits that the compensation is an accretion of that nature. He points out, quite rightly, that this is not a sum which accrued due to the respondent before the date of the contract. It accrued due after the date of the contract when the derequisitioning was completed. He submits that it comes to the respondent solely as owner and not under any collateral contract, and must, therefore, be accounted for by him as such. Counsel agrees that the rights arising under some collateral agreement such as a policy of insurance do not inure for the benefit of the purchaser, but he submits what does inure for the benefit of the purchaser is all rights which accrue to him solely as owner of the property. He referred me for the general proposition to *Shaw v. Foster* (1) for the following statement by LORD CAIRNS:

"The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relationship, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

He also referred me to *Aberdeen Town Council v. Aberdeen University* (2), where the Aberdeen Town Council, under a transaction which was in Scottish form,

(1) (1872), L.R. 5 H.L. 321.

(2) (1877), 2 App. Cas. 544.

acquired certain fishing rights for themselves although they held the property as trustee for Aberdeen University. It was held that they were accountable for those fishing rights to Aberdeen University and could not use them themselves. That was a case of an express trustee and a cestui que trust, and it is only an illustration of a very much wider proposition that in such a case a trustee may not make any profit out of his trust. It does not seem to me to be helpful on a question as between vendor and purchaser.

Counsel for the applicant also referred me to *Re Armitage's Contract, Armitage v. Inkpen* (1). In that case a somewhat similar problem arose, but VAISEY, J., determined the matter solely on the question of the true construction of certain express words appearing in the contract of sale, and it is no decision on the matter which I have to consider where there are no such express words. Counsel for the applicant, however, rightly pointed out that, if the respondent is right, that would have made it quite unnecessary to consider in *Re Armitage* (1) the construction of the agreement and he naturally relies on the fact that it seems to have been assumed as far as one can make out that if the compensation had not belonged to the vendor personally under the express words of the contract it would have belonged to the purchaser. The arguments and judgment are, however, entirely silent on the point.

On the other side counsel for the respondent says that the fiduciary relation between vendor and purchaser is a very special one, and the vendor is only trustee of the property contracted to be sold, and, he submits, of any physical accretions thereto. He referred me to the observations of JESSEL, M.R., in *Lysaght v. Edwards* (2), where he says:

"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of LORD HARDWICKE, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."

Counsel for the respondent referred me also to some observations in the later case of *Rayner v. Preston* (3), a decision of the Court of Appeal, which dealt with the question of insurance money arising between the date of the contract and the date of completion. He referred me in particular to the words of COTTON, L.J.:

"It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part."

(1) [1949] Ch. 666.

(2) (1876), 2 Ch.D. 499.

(3) (1881), 45 J.F. 829; 18 Ch.D. 1.

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Finally he referred me to *Re Lyne-Stephens & Scott-Miller's Contract* (1). In that case the property had been contracted to be sold with vacant possession. There was in existence a lease which came to an end between the date of the contract and the date fixed for completion. The lease having expired the dilapidations under the provisions thereof were agreed at £2,060 which was paid by the purchaser. SARGANT, J., whose decision was affirmed in the Court of Appeal, held that the dilapidations were payable to the vendor. He dealt with the position of vendor and purchaser in a passage which was expressly approved by LORD STERNDALE, M.R., in the Court of Appeal in that case. SARGANT, J., said:

"The purchaser says that a vendor, speaking generally, is a trustee for him of the property sold, subject to the completion of the contract, and that when the completion takes place the trust becomes an absolute one. A number of decisions were cited for that proposition, one instance being the right of the purchaser to any windfall of timber. The vendor does not dispute that general proposition, but says: 'What was it that was sold? It was not the house subject to and with the benefit of the lease which was existing at the date of the contract, but it was the house with possession, altogether apart from and independent of the lease, the obligations and rights under which were simply and solely a matter between the vendor and the lessee'. In my judgment, that contention of the vendor is correct."

That seems to me to be the principle which must govern this case and I must look and see what was the property sold. It is quite clear that it was only the property No. 77, Glendale Avenue, Edgware, with a right, though not expressed in the contract, to vacant possession on completion. There is nothing in that contract, therefore, which expressly includes the right to the compensation money.

The compensation money, as is now conceded, was properly payable to the respondent, because at the date when it became payable on Feb. 6, 1956, he was the person who satisfied the definition of "owner" in the Act in that he was entitled to receive the rackrent if there was any. It seems to me that the respondent was entitled to receive this sum under the Compensation (Defence) Act, 1939, because the Act says that he is the person to receive it, and I cannot see that he has sold or assigned that right away under any contract of sale. The contract of sale did not, in my judgment, include or comprehend this compensation money. Had that been intended then, in my view, it should have been expressly put in as part of the subject-matter of the sale. I cannot see how it is possible to say, in the circumstances of this case, that the respondent, who is entitled to receive it under the terms of the Act, becomes in some way a constructive trustee of that sum which he has not contracted to sell to the purchaser. Accordingly, I must dismiss this summons with costs.

Application dismissed.

Solicitors: *Frank J. French & Co.; Worrell, Fordyce & Lys.*

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(1) [1920] 1 Ch. 472.

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QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 18, 1958

ROYAL LONDON MUTUAL INSURANCE SOCIETY, LTD. v. HENDON BOROUGH COUNCIL

Rating—Relief—Sports ground—Ground owned by company—Maintenance for benefit of employees—Benefit derived by company—Remoteness—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1) (c).

Section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides as follows: "This section applies to the following hereditaments, that is to say . . . (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation, which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field . . ."

An insurance company were the owners and occupiers of a sports ground containing several playing fields and a pavilion. The ground was used solely for open-air games, refreshments being available in the pavilion. The management and control of the ground was undertaken by a committee from two clubs, the members of which comprised the headquarters staff of the company. The use of the ground was confined to the employees of the company, the expenses of running it being partly paid by the employees and partly by the company. Quarter sessions held that the company were entitled to relief from rates under s. 8 (1) (c) in respect of the ground. On appeal by the rating authority to the Divisional Court it was contended that the words "occupied for the purposes of a club" should be construed as meaning "occupied exclusively for those purposes", and that, as the insurance company itself had derived benefit from the sports ground in so far as it was an inducement to employees to enter its employment and thereafter be kept in good health, it could not be said that the ground was "occupied exclusively" for the purposes of a club.

Held: there was no reason for reading the word "exclusively" into the subsection in the manner suggested; if there were any substance in the suggestion that the insurance company itself derived benefit from the club, quarter sessions had rightly held that that benefit was too remote to be taken into account, and, therefore, the appeal must be dismissed.

CASE STATED by London Quarter Sessions.

The Royal London Mutual Insurance Society, Ltd., appealed to quarter sessions against the general rate which had been charged by the local authority, the Hendon Borough Council, in respect of the Royal London Sports Ground, of which the company were the occupiers and owners, on the ground that the hereditament was "a playing field . . . occupied for the purposes of a club" within the meaning of s. 8 (1) (c) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. It was proved or admitted that the insurance company were the owners and occupiers of the Royal London Sports Ground which contained several playing fields and a pavilion. The ground was used for the purpose of open-air games and refreshments were available in the pavilion. No other activity took place upon the ground. The management and control of the ground was undertaken by a committee, formed jointly by two clubs, whose members comprised the headquarters clerical staff of the insurance company. The use of the ground was confined to the employees of the insurance company. The expenses of running the ground were defrayed partly by the employees and partly by the insurance company. Quarter sessions held that the company were entitled to relief, and the local authority appealed to the Divisional Court.

Miss M. S. Viner for the appellants.

W. L. Roots for the respondents.

LORD GODDARD, C.J.: This is a Case stated by quarter sessions for the county of Middlesex, the question being whether or not a particular sports ground which is run on behalf of a club formed by members of the clerical staff of the Royal London Mutual Insurance Society, Ltd., is entitled to the benefit of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act of 1955. [His LORDSHIP read the section and continued:] According to the facts found by quarter sessions, this ground is used by a club consisting of male and female members of the staff of the society. They pay a subscription and the society gives a grant towards the upkeep of the ground. It is said that this is one of the schemes by which the society seek to attract and benefit their staff, and, if they benefit their staff with a view to making them a contented and efficient staff, that shows that the hereditament is occupied for the purposes of the society. Quarter sessions have held that considerations of that sort are too remote, and I agree with them. In my opinion, the only thing we have to consider here is: Is the hereditament being used as a playing field? Is it occupied for the purposes of a club? The argument of counsel for the appellants really asks us to read into the section the words "occupied exclusively for the purposes of the club", or "occupied substantially for the purposes of the club". I do not think we can read in those words, though for myself I am not satisfied that if the word "exclusively" had been put in, it would have made any difference in this case. It seems to me that this is a sports ground. Membership is, no doubt, limited to the staff of a particular company, just as many other industrial concerns have sports grounds and clubs which are limited to the employees of the particular company. The club having been formed for the purpose of sports and athletic games, and those sports and athletic games being carried on on this ground and no profit being made by the club and no charge being made for admission, it seems to me that the hereditament comes fairly and squarely within the words of s. 8 (1) (c). In my opinion, quarter sessions came to the only conclusion to which they could come, and this appeal fails and must be dismissed with costs.

HILBERY, J.: I agree. It seems to me that this case comes exactly within the words of s. 8 (1) (c). Here the hereditament consisted of a playing field used for open-air games and athletic sports. It was occupied, on the facts stated in the Case, for the purposes of a club. The club, it is true, was, as my Lord has pointed out, a club the membership of which was limited to employees in the employment of the Royal London Mutual Insurance Society, Ltd., but that the land was occupied for the purposes of that club is beyond question. As a matter of fact, that is what is found. The argument, apparently, is that, because a purpose of the insurance society becoming the occupiers of the land in question was the formation of a club which might be of benefit to those members of their staff who joined it, the occupation of the premises of that club was not exclusive occupation for the purposes of the club, but partly occupation for the purposes of the society. In my view, that consideration is far too remote, and this is exactly the sort of case that the subsection was intended to cover.

DONOVAN, J.: I agree. In my opinion, quarter sessions were clearly right because the ground is admittedly occupied for the purposes of such a club as is described in s. 8 (1) (c). The rating authority want the words read as "occupied exclusively for the purposes of the club". The word "substantially" would not do. What the rating authority must have read in if they are to succeed is the word "exclusively". They support that contention on these grounds. They say that the land was bought by the company to fulfil a commercial purpose, namely, a contented healthy staff, and that is conceded.

Obviously, in order to spend this money the company had to fulfil some purpose within the four corners of its memorandum of association, but that of itself does not justify the court writing in the word "exclusively" where the rating authority want it written into this section, that is, as qualifying the words "occupied for the purposes of the club". Another argument against writing in the word "exclusively" is that in the earlier part of the subsection the words are "any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games)" and so on. If Parliament had meant the word "exclusively" also to govern the expression "purposes of a club", it clearly would have said so. Quarter sessions have taken the view that the alleged purpose or advantage to the company is too remote, and I agree, but I would prefer to put it in this way, that this case is within the expression "occupied for the purposes of the club", and that is enough. Furthermore, although the land was bought and equipped in the first place to fulfil the purposes of the company, the actual occupation seems to me to be for the purposes of the club, and the benefit to the company is really a by-product of that occupation, albeit a by-product that, no doubt, was envisaged from the outset.

Appeal dismissed.

Solicitors: *R. H. Williams*, Town Clerk, Hendon; *A. Russell Firth*.

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., DONOVAN AND HAVERS, J.J.)

March 31, April 1 and 21, 1958

R. v. ST. MARGARET'S TRUST, LTD. AND OTHERS

Hire-Purchase—Finance company—Disposal of goods without specified percentage of cash price being paid—Defence—Absence of mens rea—Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956, No. 180), art. (1).

By art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956: "A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement . . . unless the requirements specified . . . are or have been satisfied in relation to that agreement." The requirements included one that a specified percentage of the cash price, which varied with the class of goods, had to be paid before the signing of the agreement. In the case of "mechanically propelled vehicles" the percentage was 50 per cent. so that one effect of the order was that a purchaser of a motor car on hire-purchase had to pay a deposit of at least 50 per cent. of the cash price.

As a result of a conspiracy between a company engaged in buying and selling cars, two of its officers, and certain customers who required cars on hire-purchase terms, a false inflated cash price was stated to a hire-purchase finance company, who were thereby induced to advance more than they would have done had the truth been told to them. They were also informed untruthfully that the customer had already paid his fifty per cent. of the false cash price, whereas, in fact, he had not paid fifty per cent. of the true cash price. In those circumstances the hire-purchase finance company executed transactions forbidden by art. 1, inasmuch as fifty per cent. of the true cash price had not been paid before the signing of the agreements, but they admittedly acted innocently throughout. The hire-purchase finance company were convicted of the offences of disposing of goods in circumstances which contravened art. 1 and the company engaged in buying and selling cars and its officers were convicted of aiding and abetting the commission of those offences.

HELD: that, having regard to the object of the Order and the fact that its words were an express and unqualified prohibition of the acts done by the hire-purchase finance company, mens rea was not an ingredient of the offences with which they were charged, and the consideration of it was irrelevant, and, therefore, the convictions were right.

APPEALS against conviction.

The first appellants, St. Margaret's Trust, a finance company, were convicted at the Central Criminal Court before DIPLOCK, J., on Sept. 16, 1957, of seven offences of disposing of goods in circumstances which contravened art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956. The second appellants, Oliver Autos, Ltd., a company engaged in buying and selling cars, and the third and fourth appellants, Victor Richard and Sidney John Hone, two of its officers, were convicted of aiding and abetting the commission of the offences. All the appellants were fined: St. Margaret's Trust, a nominal fine of £5 on each count; Oliver Autos, £50 on each count; Richard, £50 on each count, and Hone, £50 in all.

As a result of a conspiracy between the second, third and fourth appellants and certain customers who required motor cars on hire-purchase, a false inflated cash price was stated to St. Margaret's Trust, who were thereby induced to advance more than they would had the truth been told to them. They were also informed untruthfully that the customer had already paid his 50 per cent. of that false cash price. In fact he had not even paid the full 50 per cent. of the true cash price and part of the excessive advance from St. Margaret's Trust was used to supply the deficiency. In those circumstances the transaction was carried out in a way which in law made St. Margaret's Trust the owner of the vehicle and since the word "dispose" in art. 1 of the order by definition included the disposal of the right to possession, it followed that St. Margaret's Trust executed a transaction which was forbidden by art. 1 inasmuch as 50 per cent. of the true cash price was not paid before the signing of the hire-purchase agreement. St. Margaret's Trust admittedly acted, however, quite innocently throughout. The first appellants contended that, in the absence of mens rea, they could not be convicted of an offence under art. 1, and the other appellants contended, that, as the first appellants in the absence of mens rea had committed no offence, they themselves had not aided or abetted the commission of any offence.

Gerald Gardiner, Q.C., and J. C. Lawrence for the first appellants.

Silkin for the other appellants.

Lauton, Q.C., and Faulks for the Crown.

Cur. adv. vult.

Apr. 21. **DONOVAN, J.**, delivered the judgment of the court: St. Margaret's Trust, Ltd., a company whose business comprises the financing of hire-purchase transactions, was convicted at the Central Criminal Court before DIPLOCK, J., on Sept. 16, 1957, of seven offences of disposing of goods in circumstances which contravened art. 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. 1956 No. 180), hereinafter called "the order". Oliver Autos, Ltd., a company engaged in buying and selling motor cars, and Mr. Richard and Mr. Hone, two of its officers, were convicted of aiding and abetting the commission of these offences. All the appellants were fined, the fine on St. Margaret's Trust, Ltd. being the nominal one of £5 for each offence.

The case arose out of what is popularly known as "the credit squeeze". One aspect of this was a decision by the government to restrict the amount of credit given in hire-purchase transactions; and to implement this decision the order was made by the Board of Trade pursuant to its statutory powers in that behalf which the order recites. Article 1 thereof enacts that:

"A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement entered into after Feb. 24, 1955, unless the requirements specified in sched. 2 hereto are or have been satisfied in relation to that agreement."

The requirements contained in sched. 2 include a requirement that a specified percentage of the cash price of the goods must be paid before the signing of the agreement. The percentage is laid down in sched. 1 to the order and varies with the class of goods. In the case of "mechanically propelled vehicles" it is fifty per cent. One effect of the order is therefore this, that a purchaser of a motor car on hire-purchase must pay a deposit of at least fifty per cent. of the cash price. Paragraph 3 of Sch. 2 allows the reasonable value of any car tendered in part exchange to be reckoned as part of the deposit.

The order considerably restricted, as no doubt it was intended to do, the business of selling motor cars on hire-purchase or credit terms, a business in which Oliver Autos, Ltd. were engaged, and that company, together with Richard and Hone, set themselves out deliberately and dishonestly to break the law. To describe what they did it is unnecessary to go into figures. It is clear that if a customer must pay at least fifty per cent. deposit on a car that he wishes to purchase, any hire-purchase finance company like St. Margaret's Trust, Ltd. can advance no more than the remaining fifty per cent. It follows that the higher the cash price the larger will be this advance. If, therefore, the hire-purchase company is told and accepts that the cash price is a higher figure than it really is, the advance will be more than if the true cash price were revealed, and the excess may be used by the car dealer or the customer to make up the customer's deposit of fifty per cent. of the true cash price, if the customer himself is unable to provide it all. That is what was done in the present case. A false inflated cash price was stated to St. Margaret's Trust, Ltd., which was thereby induced to advance more than it would had the truth been told to it. It was also informed untruthfully that the customer had already paid his fifty per cent. of this false cash price. In fact he had not even paid the full fifty per cent. of the true cash price, and part of the excessive advance from St. Margaret's Trust, Ltd., was used to supply the deficiency. In these circumstances, since the transaction was carried out in a way which in law made St. Margaret's Trust, Ltd. the owner of the vehicle, and since the word "dispose" in art. 1 of the order by definition includes the disposal of the right to possession, it follows that St. Margaret's Trust, Ltd. executed a transaction which was forbidden by art. 1, inasmuch as fifty per cent. of the true cash price was not paid before the signing of the hire-purchase agreement. St. Margaret's Trust, Ltd. admittedly acted, however, quite innocently throughout. The fraud by which they were induced to dispose of the vehicle, although an inadequate deposit had been paid, was the result of a conspiracy between Oliver Autos, Ltd., Richard, Hone and the respective customers who wanted the cars.

In these circumstances, not surprisingly, St. Margaret's Trust, Ltd. argued before the learned trial judge that in the absence of mens rea on its part, it could not be convicted under art. 1 of the order. Oliver Autos, Ltd., and Richard and Hone in turn submitted that as St. Margaret's Trust, Ltd. in the absence of mens rea on its part had committed no offence they themselves had aided and abetted the commission of no offence. None of the respective customers was charged, they being called instead as witnesses for the Crown. The prosecution, while admitting the absence of mens rea in St. Margaret's Trust, Ltd., contended that this was irrelevant and that the prohibition contained in art. 1 of the order was absolute in the sense that if a prohibited transaction was entered into an offence was committed even if the person concerned did so innocently. DIPLOCK, J.,

upheld this view. He then granted a certificate of appeal on the ground that in the preceding session of the Central Criminal Court BARRY, J., had come to an opposite conclusion in a similar case. The present appellants, however, had been committed for trial at the time of BARRY, J.'s ruling, so that the prosecution were able, when the matter came before DIPLOCK, J., to argue the point afresh.

The language of art. 1 of the order expressly prohibits what was done by St. Margaret's Trust, Ltd., and if that company is to be held to have committed no offence some judicial modification of the actual terms of the article is essential. The appellants contend that the article should be construed so as not to apply where the prohibited act was done innocently. In other words, that mens rea should be regarded as essential to the commission of the offence. The appellants rely on the presumption that mens rea is essential for the commission of any statutory offence unless the language of the statute, expressly or by necessary implication, negatives such presumption. The matter was thus put by WRIGHT, J., in his well-known judgment in *Sherras v. De Rutzen* (1):

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

A little nearer to the present day KENNEDY, L.J., put the matter in this way in *Hobbs v. Winchester Corpn.* (2):

"... I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist. I think with great respect to my brother CHANNELL that he has applied to the construction of this modern statute a maxim which is recognised as applicable to offences at common law, and it may be, as STEPHEN, J. suggests in *Cundy v. Le Cocq* (3) ((1884), 13 Q.B.D. 207), also to offences under the earlier statutes which are to be treated on the same basis as offences under the common law. To quote his words, so far as they have not been quoted—and I accept the view which STEPHEN, J. there states—'In old time, and as applicable to the common law or to earlier statutes, the maxim'—that is, the maxim that in every criminal offence there must be a guilty mind—'may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *R. v. Prince* (4) and *R. v. Bishop* (5), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created'."

What KENNEDY, L.J., is here saying, we think, is that modern statutes create offences where knowledge on the part of an offender is not essential, and that accordingly there is no universal prior presumption of mens rea. Each statute must be construed according to its terms and its object. If, so construed, mens rea is not expressly or by necessary implication excluded, it is then that it will be regarded as essential. Other cases cited in the course of the argument included

(1) 59 J.P. 440; [1895] 1 Q.B. 918.

(2) 74 J.P. 413; [1910] 2 K.B. 471.

(3) (1884), 48 J.P. 599; 13 Q.B.D. 207.

(4) (1875), 39 J.P. 676; L.R. 2 C.C.R. 154.

(5) (1880), 44 J.P. 330; 5 Q.B.D. 259.

Nichols v. Hall (1); *R. v. Tolson* (2); *Brooks v. Mason* (3); *Brend v. Wood* (4); *Harding v. Price* (5); *Reynolds v. G. H. Austin & Sons, Ltd.* (6); *Mousell Brothers v. London & North Western Ry.* (7); *Quality Dairies (York), Ltd. v. Pedley* (8).

There is no difference for present purposes between a statute and a statutory instrument and the question for determination is therefore this: Do the words of art. 1 of the order considered together with the object of the order make the prohibited act an offence, even though the doer of the act had no guilty mind and acted innocently?

The words of the order themselves are an express and unqualified prohibition of the acts done in this case by St. Margaret's Trust, Ltd. The object of the order was to help to defend the currency against the peril of inflation which, if unchecked, would bring disaster on the country. There is no need to elaborate this. The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree. Indeed, that would be the natural expectation. There would be little point in enacting that no one should breach the defences against a flood, and at the same time excusing anyone who did it innocently. For these reasons we think that art. 1 of the order should receive a literal construction and that the ruling of DIPLOCK, J., was correct.

It is true that Parliament has prescribed imprisonment as one of the punishments that may be inflicted for a breach of the order, and this circumstance is urged in support of the appellants' argument that Parliament intended to punish only the guilty. We think it is the better view that, having regard to the gravity of the issues, Parliament intended the prohibition to be absolute, leaving the court to use its powers to inflict nominal punishment or none at all in appropriate cases.

It may also be true that hire-purchase transactions, in order to avoid difficulties under the Bills of Sale Acts, are carried through in such a way that the finance companies concerned become easy victims of such a fraud as was here perpetrated on St. Margaret's Trust, Ltd., for they have no control over the car dealer or the customer. But if Parliament enacts that a certain thing shall not be done it is not necessarily an excuse to say: "I carry on my business in such a way that I may do this thing unwittingly and therefore should suffer no penalty if I transgress". The answer in some cases is that the importance of not doing what is prohibited is such that the method of business must be re-arranged so as to give the necessary knowledge. The present, we think, is such a case.

Stress was also laid during the course of the argument for the appellants on the language of art. 3 of the order which prohibits any person from causing or permitting goods owned by him to be in the possession of another by virtue of a hire-purchase agreement in certain circumstances. It is said that the words "cause or permit" involve that mens rea is essential to the commission of an offence under art. 3, and it is not to be supposed that the same order requires mens rea for the commission of an offence under one article and not under another.

(1) (1873), 37 J.P. 424; L.R. 8 C.P. 322.

(2) (1889), 54 J.P. 4, 20; 23 Q.B.D. 168.

(3) 67 J.P. 47; [1902] 2 K.B. 743.

(4) (1946), 110 J.P. 317.

(5) 112 J.P. 189; [1948] 1 All E.R. 283; [1948] 1 K.B. 695.

(6) 115 J.P. 192; [1951] 1 All E.R. 606; [1951] 2 K.B. 135.

(7) 81 J.P. 305; [1917] 2 K.B. 836.

(8) 116 J.P. 123; [1952] 1 All E.R. 380; [1952] 1 K.B. 275.

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The argument is obviously double-edged: for the prosecution might argue that the presence of the words "cause or permit" in art. 3 shows that their omission in art. 1 was deliberate and that therefore the inference regarding mens rea is the opposite to that contended for by the appellants. It is not, however, possible to deal adequately with the argument without knowing exactly the type of transaction envisaged by art. 3, and this seems to be in doubt. It might be of such a type that in contradistinction to the transactions covered by art. 1 it would be reasonable to imply that mens rea was a necessary ingredient of any transgression. But regarding the matter purely as one of construction we are not prepared to say that the presence of the words "cause or permit" in art. 3 outweighs the considerations we have referred to as bearing on the construction of art. 1.

It should not be inferred from what we have said that we are deciding that mens rea is required by the language of art. 3. We leave that point entirely open, to be decided if and when the issue directly arises, which it does not do in the present case.

Appeal dismissed.

Solicitors: *Dennison, Horne & Co.; Barradale, Blacket, Gill, Silkin & Young;*
Solicitor, Board of Trade.

T.R.F.B.

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QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 22, 1958

GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 v. WEST HAM CORPORATION

Rating—Relief—Charitable organisation—"Conducted for profit"—Trust for provision of workmen's dwellings—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 and 5 Eliz. 2, c. 9), s. 8 (1) (a).

A trust claimed relief from rating for its hereditaments on the ground that it was an organisation whose main objects were charitable (which was not disputed) and which was "not established or conducted for profit" within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Clause 1 (B) of the trust deed provided: "... it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character retaining a fair low rate of interest ... be kept intact and go on increasing, so that ... the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty." Quarter sessions held that the trust was entitled to the relief claimed. On appeal by the rating authority,

HELD: that, though the trust was not established for profit, it was conducted for profit because it sought an accumulation of funds which would enable the trustees to invest in other buildings and thus increase the benevolent objects of the settlor; if profit was being made, the rating authority did not have to consider what was done with the profit or whether it was used for charitable or other purposes; and, therefore, the trust was not entitled to the benefit of s. 8.

CASES STATED by the recorder of West Ham.

On Apr. 15, 1957, the Guinness Trust (London Fund) appealed to West Ham Quarter Sessions against a rate of £935 6s. 8d. made by the West Ham Corporation for the year beginning Apr. 1, 1956, in respect of the hereditament

known as the Working Persons Hostel and also appealed against a rate of £18 4s. 2d. in respect of the hereditament known as Flat Ground Floor, 106, John Street, West Ham. The ground of both appeals was that the provisions of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, should be applied in respect of both hereditaments. The following facts were found.

The Guinness Trust (London Fund) was an organisation whose main objects were charitable. It was established in 1890 by a deed of trust and was incorporated by order of the Charity Commissioners in 1902. Its activities consisted mainly of providing houses for "people who are not well-to-do". Its policy had been, after allowing for all outgoings, to realise a net income of three per cent. on its capital, which was applied in acquiring additional properties and expanding the work of the trust. The operation of the Rent Restrictions Acts had long prevented the trust from attaining this object and in 1949 and 1954 it sustained a loss of over £2,000 in each year. During the years 1946-55 its average profit was £9,150 and the trust was again on a sound financial footing. Its original capital fund was £200,000, which had been increased by the end of 1955 to about £1,500,000. The rateable values of the two hereditaments for the financial year 1955-56 were £188 and £11 respectively and the rates paid amounted to £263 4s. and £15 8s. The rateable values for the financial year 1956-57 (the first year of the new valuation list) were £976 and £19 and the rates payable would be £935 6s. 8d. and £18 4s. 2d.

The sole issue before the recorder was whether or not the trust was established or conducted for profit within the meaning of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The trust contended that it was not established or conducted for profit in that, although its policy was to secure a surplus of receipts over expenditure in any year, this surplus was applied exclusively for the charitable purposes of the trust. For the West Ham Corporation it was contended that the terms of the deed of trust made it clear that a profit was deliberately aimed at; that the accounts and the course of business showed that a profit was made, and that its destination was irrelevant. The corporation also contended that it was not the intention of the Act to relieve at the expense of ratepayers generally charitable organisations which were in fact conducted for profit. The recorder allowed the appeal, holding that the trust was not established for profit (and therefore the question of being conducted for profit did not arise) because profit, while contemplated by the deed of trust, was entirely incidental to the objects of the trust. The corporation appealed.

Rowe, Q.C., and *A. G. F. Rippon* for the corporation.

Widgery, Q.C., for the respondent trust.

LORD GODDARD, C.J.: This is a Case stated by the learned recorder of West Ham, and raises the short question whether certain buildings consisting of workmen's dwellings owned by a charitable body called the Guinness Trust are or are not entitled to the benefit of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, a section which has been before the courts on a great number of occasions and is in these words:

"This section applies to the following hereditaments, that is to say—

(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The objects of the organisation known as the Guinness Trust are admittedly charitable, so that the buildings owned by them satisfy one limb of the section,

but the organisation must not only have charitable objects, it must also be one that is not established or conducted for profit. The Guinness Trust was established by a trust deed dated Feb. 4, 1890, in which the late Sir Edward Guinness, afterwards Lord Iveagh, settled the sum of £200,000 on trustees on the trusts set out in the deed. Clause 1 (B) provides:

"Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing, so that, whilst payments of money in the nature of gifts or not returnable by the recipients are not precluded, the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty."

In the recitals of the trust deed the settlor showed that his main object was the provision of dwellings in which people could live in terms of self-respect and not in slum dwellings or in insanitary conditions. It is clear that what Sir Edward Guinness desired was that this sum of £200,000 should be administered by the trustees in erecting buildings and letting them to tenants at such a low rent as would enable the trust to maintain the buildings and to accumulate funds; the settlor hoped and desired that more buildings of this nature would be put up either by his trustees or other like-minded charitable people, so that the dwellings of the poor of London would be very largely increased. That was the object of the trust; and I have read the direction to the trustees. The trustees are therefore to invest their money in buildings charging rents which will yield a low rate of interest. That is a profit and the profit will be accumulated and used for the purpose of acquiring for the benefit of the trust other buildings or erecting other buildings, though not for the personal profit of any member of the trust, still less of the settlor.

We have merely to consider the exemption which is given by Act of Parliament to an organisation which not only must be charitable but also must be neither established nor conducted for profit. Let it be assumed, as I think it may properly be assumed, that the Guinness Trust is not established for profit in the sense that that is not the object of the trust. It is, however, to be conducted for profit and exists in order that there may become an accumulation of funds which will enable the trustees to invest in other buildings and thus increase the benevolent objects which the settlor had in mind. The rating authority is not, it seems to me, concerned with more than whether the conduct of the business is for profit, and here it is for profit. It is for other objects, no doubt, but it is conducted for profit. The clause which I have read distinguishes this case, if distinction is needed, from *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1), to which we have been referred, which shows that if a profit is being made the rating authority is not concerned with what is done with that profit. The rating authority does not have to consider whether the profit is used for charitable purposes or whether it is used for any other purpose. In my opinion, with all respect to the learned recorder and the argument of counsel for the respondent, it is a very short point. I will assume that the organisation is not established for profit, but, in my opinion, it is conducted for profit, because it is making profits and its object is making profits for the purposes that I have indicated; and, in my opinion, although its main objects are charitable it is not entitled to the benefit of the section. The appeals must be allowed.

HILBERY, J.: I am of the same opinion. To bring these premises in question within s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it must be shown that the Guinness Trust is not established or conducted for profit and its main objects are charitable objects. The difficulty in the way of the Guinness Trust seems to me to be in the terms of the deed which created the trust. It is conceded that under that deed the main object for which it was established is charitable, but the question arises whether it is also conducted for profit. I find it difficult to escape from the express terms of cl. 1 (B) which has been read by my Lord because there the founder of the trust expressed himself thus:

"Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing . . ."

In my view, the fair interpretation of that is a direction to the trustees so to conduct the affairs of the trust as to produce a profit, which will if possible increase the fund available for the charitable purposes. That is conducting for profit, and it distinguishes the case from the decision of the Court of Appeal on which counsel for the respondent placed great reliance, *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1), because the words of PARKER, L.J., on which particular stress was laid were these:

"The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit."

In my view, if the facts were that in this case the trustees had, merely incidental to the discharge of the trust, so to invest money as to increase the amount available for charitable purposes the case would come immediately within the reasoning of that judgment, but that is not the case here. It is not that incidentally or fortuitously these profits have been made by the trustees. They have been made pursuant to the direction given to them about the affairs of the trust under the trust deed in cl. 1 (B) which I have read. In my view, therefore, the contention of the Guinness trustees here fails.

DONOVAN, J.: I agree. It seems to me that all that the learned recorder thought he had to decide here was whether the trust was established for profit, and if he decided it was not then he had automatically to decide that the trust was not conducted for profit. I think that is clearly wrong. There are two separate conditions in the section both of which must be satisfied before there is a claim for relief. I merely venture to repeat what I said in argument to counsel for the respondent in connexion with the judgment of PARKER, L.J., about the concern being conducted for profit. Where a concern simply invests its reserves in order to get a return until the reserves are required for the business, it is natural to say that in so investing its reserves the concern is not merely on that account conducting its affairs for profit. It is otherwise where the whole business is to make investments and so earn a profit, whether the investments be in stocks and shares or in dwelling-houses.

Appeals allowed.

Solicitors: *Town Clerk, West Ham Corporation; Travers Smith, Braithwaite & Co.*
T.R.F.B.

(1) 121 J.P. 567; [1957] 3 All E.R. 199; [1957] 2 Q.B. 573.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 25, 1958

BALDWIN v. PEARSON

Highway—Hindering by negligence free passage—Opening of motor car door by passenger—Highway Act, 1835 (5 and 6 Will. 4, c. 50), s. 78.

By s. 78 of the Highway Act, 1835: "... if any person shall in any manner ... by negligence or misbehaviour prevent, hinder or interrupt the free passage of any person ... on any highway", he shall be guilty of an offence. The words "if any person shall ... by negligence ... hinder ..." include a passenger in a vehicle, and ought not to be construed as referring only to a driver.

CASE STATED by the recorder of Bradford.

An information was preferred at Bradford Magistrates' Court by the prosecutor, Cyril Baldwin, a police officer, charging the defendant, Dorothy Pearson, with by negligence hindering the free passage of a person on a highway, contrary to s. 78 of the Highway Act, 1835. The justices convicted the defendant, who appealed to quarter sessions. The recorder allowed the appeal and quashed the conviction. The defendant was a passenger in a motor car and negligently opened the door with the result that a passer-by was knocked down. The recorder was of opinion that the provisions of s. 78 did not apply to a passenger in a vehicle, but only to the driver. The prosecutor appealed to the Divisional Court.

Boyle, Q.C., and S. Brodie for the prosecutor.

Hickman for the defendant.

LORD GODDARD, C.J.: This is a Case stated by the recorder of Bradford, to whom the defendants appealed against a conviction of by negligence hindering the free passage of a person on a highway. What the defendant did was carelessly and negligently to open the door of the motor car in which she was a passenger, with the result that she knocked down somebody who was on the road. It is alleged that she cannot be convicted of any offence because, it is said, she was not driving the car. The section under which she was prosecuted is s. 78 of the Highway Act, 1835, which, so far as is material, provides:

"... if any person shall in any manner wilfully prevent any other person from passing him, or any waggon, cart, or other carriage, or horses, mules, or other beasts of burden under his care, upon such highway, or by negligence or misbehaviour prevent, hinder or interrupt the free passage of any person, waggon, cart, or other carriage ... he shall be guilty of an offence."

It is said that the word "person" when it is used in relation to the second part of the above enactment is to be read with an interpretation different from that to be given to it in the first part. I am not inclined to accept that argument at all. The learned recorder, in allowing the appeal, said that he was of the opinion "that the provisions of s. 78 of the Highway Act, 1835, did not apply to a passenger in a vehicle, and, therefore, that the defendant had not committed an offence against the section". The short answer to that is that a passenger in a vehicle is a person. The section does not say that the offence can be committed only by a driver. The offence can be committed just as much by a person sitting by the driver or at the back of the car. There is no reason for adding a description of the word "person". It seems to me that the Act is dealing with persons who interfere with other persons. For these reasons, I think the matter is too clear

for argument. In *Watson v. Lowe* (1) it was pointed out by the court that *Shears v. Matthews* (2) depended entirely on the particular part of the section under which the defendant was summoned. In my opinion, this appeal must be allowed and the conviction restored. Here is a section which begins by specifying drivers and then persons who ride and places obligations on them, and subsequently places obligations on any person, and I think it is impossible to restrict those last words so as to mean only the driver, who has been referred to earlier in the section.

HILBERY, J.: I agree.

DONOVAN, J.: I agree.

Appeal allowed.

Solicitors: *Wilkinson, Howlett & Moorhouse*, for *W. H. Leathem*, Town Clerk, Bradford; *Crossman, Block & Co.*, for *Eaton Smith & Downey*, Huddersfield.

T.R.F.B.

(1) 114 J.P. 85; [1950] 1 All E.R. 100.

(2) 113 J.P. 36; [1948] 2 All E.R. 1064.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 30, 1958

SOUTHWORTH v. WHITEWELL DAIRIES, LTD.

Food and Drugs—Milk—Sale of article not of substance demanded—Sliver of glass in milk bottle—Food and Drugs Act, 1955 (4 and 5 Eliz. 2, c. 16), s. 2.

The respondents sold milk for children in an infants' school. An infant who was drinking milk by means of a straw sucked up with it a small sliver of glass which was sharp enough to penetrate the skin. The respondents were charged at a magistrates' court with selling to the prejudice of the purchaser an article of food, namely milk, which was not of the substance demanded by the purchaser, contrary to s. 2 of the Food and Drugs Act, 1955. The justices, relying on *Edwards v. Llaethdy Meirion, Ltd.* (1957), 107 L.J. 138, where a clean and sterilised cap had been found in a milk bottle, dismissed the information.

HELD: whereas the sterilised and clean cap of a bottle would not contaminate the milk in any way, a sliver of glass sharp enough to penetrate the skin was in a different position and a potential source of danger and the case must be remitted to the justices with a direction that the offence was proved.

CASE STATED by Lancashire justices.

At a magistrates' court an information was preferred by the appellant Southworth, an inspector of food and drugs for the county of Lancashire, charging the respondents, Whitewell Dairies, Ltd., with unlawfully selling to the prejudice of the purchaser, the education committee of the Lancashire County Council, a certain article of food, namely, milk, which was not of the substance of the article, namely, milk, demanded by the purchaser in that it contained broken glass, contrary to s. 2 of the Food and Drugs Act, 1955. The respondents sold milk to a school for children in the infants' school, and an infant who was drinking milk by means of a straw sucked up with it a small sliver of glass which was sharp enough to penetrate the skin. The bottle itself was a perfect bottle. The justices, relying on *Edwards v. Llaethdy Meirion, Ltd.* (1), dismissed the information. The appellant appealed.

P. C. S. Kershaw for the appellant.

The respondents did not appear.

LORD GODDARD, C.J.: This is a Special Case stated by justices for the county of Lancaster, before whom an information was preferred by the appellant against the respondents for unlawfully selling to the prejudice of the education committee of the Lancashire County Council a certain article of food, namely, milk, which was not of the substance of the article, namely, milk, demanded by the purchaser, in that it contained broken glass, contrary to s. 2 of the Food and Drugs Act, 1955. The respondents sold milk to a school for the children in the infants' school, and an infant who was drinking some milk by means of a straw sucked up with it a sliver of glass. It was a very small sliver of glass, but it was obviously a potential source of danger, because the justices find that it was sharp enough to penetrate the skin. The offence that was alleged was that the milk that was sold had got the piece of glass in it. The justices also found that the bottle itself was a perfect bottle, and, therefore, inferentially they found that the sliver of glass did not break off from that bottle. The justices dismissed the information, relying on a decision of this court in *Edwards v. Llaethdy Meirion, Ltd.* (1) which is referred to in *STONE'S JUSTICES MANUAL*, 1958 edn., p. 918. That was quite a different case. There what had found its way into the bottle was the metal cap of a bottle, and the justices found that it was a clean and sterilised cap which could not have any effect on the milk. We pointed out, in giving judgment, that, whenever there is a milk bottle with the top on it, the milk is always touching the top, just as in a bottle of wine the wine is always touching the cork. So the mere fact that there was the top of a bottle, sterilised and clean, in the milk would not contaminate the milk in any way. But in the present case it was not the metal top of a bottle. It was a sliver of glass which the child managed to suck up through the straw or pipe which it was using; and the justices found that, although it was a very small one, it was sharp enough to penetrate the skin, or to be capable of penetrating the skin. Therefore, I think this case must go back to the justices with a direction that the offence was proved.

HILBERY, J.: I agree.

DONOVAN, J.: I agree.

Appeal allowed.

Solicitors: *Norton, Rose & Co.*, for *Sir Robert Adcock*, Preston.

T.R.F.B.

(1) (1957), 107 L.J. 138.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, J.J.)

April 16, 17, 30, 1958

EASTBOURNE CORPORATION v. FORTES ICE CREAM PARLOUR

Town and Country Planning—Enforcement notice—Appeal to magistrates' court by person aggrieved—Jurisdiction of justices—Consideration of question of development or no development—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 12 (2), s. 17 (2), s. 23 (4).

On an appeal under s. 23 (4) of the Town and Country Planning Act, 1947, to a magistrates' court by a person aggrieved by the service of an enforcement notice, the court has no jurisdiction to determine whether or not the matters referred to in the notice constitute development within s. 12 (2) of the Act: so held by HILBERY and DONOVAN, J.J., LORD GODDARD, C.J., dissenting).

Per HILBERY and DONOVAN, J.J.: In so far as the proviso to s. 17 (2) of the Act of 1947 purports to give an appeal to a magistrates' court on the question of development or no development, it is repugnant to s. 23 (4), which subsection must be regarded as having an overriding effect.

CASE STATED by justices for the county borough of Eastbourne.

On June 13, 1957, the respondents, Fortes Ice Cream Parlour (1955), Ltd., preferred a complaint for an order to quash or vary a notice dated May 16, 1957, of the appellants, Eastbourne Corporation, relating to premises at 247, Terminus Road, Eastbourne, and expressed to be an enforcement notice served pursuant to the Town and Country Planning Act, 1947, s. 23, requiring the respondents to remove an automatic ice cream sales machine which had been affixed to and installed on the forecourt of 247, Terminus Road, together with an electric cable attached thereto, and further to remove the bolts and other fittings securing the machine to the forecourt within twenty-one days after the date on which the notice became effective, which was on the expiration of twenty-eight days from the service of the notice. The notice stated that the installation of the machine constituted development within the meaning of the Act of 1947 and that it had been carried out without the grant of planning permission under Part 3 of the Act.

At the hearing at Eastbourne Magistrates' Court on July 12, 1957, the following facts were found. The premises at 247, Terminus Road were a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. The shop was occupied by the respondents as an ice cream parlour and restaurant under a lease held in trust for the respondents by one Forte, as director thereof. The external appearance of the premises was that of an ice cream parlour and restaurant on the ground floor having a paved forecourt adjoining the public footway of the two roads. The shop front facing these roads had a black base, large glass windows displaying food menus and advertisements, and a fascia board at a height of from twelve to fourteen feet above the forecourt and bearing the words "Fortes Ice Cream Parlour". In or about June, 1956, the respondents purchased an automatic coin-operated ice cream sales machine from the manufacturers thereof, who then delivered it to the premises and placed it on the forecourt in the corner thereof nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, six feet two inches high, approximately thirty inches square and weighed approximately five and a half hundredweight. There were holes in the base of the machine whereby it could be bolted to a packing case when in transit or bolted to the ground when in use. The machine in question was not attached to the forecourt by bolts

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otherwise. Other holes allowed axles and wheels to be attached to the base of the machine but these were not normally attached to the machine in question. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a five-eighths inch conduit) which was connected to the mains supply in the premises. The conduit came from a grille in the base of the shop front and was fitted by an electrician from a nearby shop. The conduit was black. It was the manufacturers' practice to advise purchasers on the siting, operation and maintenance of their machines, and a representative of the manufacturers had called to see the respondents' machine from time to time since June, 1956. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. On June 24, 1957, the respondents' machine was removed from the forecourt. It took about five minutes to disconnect the electricity cable and remove the machine. By fitting a "Nipham" switch, the time taken to disconnect the cable could be considerably shortened. The machine was removed on June 24, 1957, in order to take photographs of the premises without it, and it was thereafter immediately replaced. Otherwise it had not been removed from the premises since its arrival, and had been moved only slightly from time to time.

It was contended by the respondents:—(a) the magistrates were not bound to assume that the matters alleged in the enforcement notice had occurred or, in so far as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; (b) neither what was alleged in the enforcement notice nor what had, in fact, occurred amounted to the carrying out of development within the meaning of s. 12 of the Act of 1947, and, accordingly, the magistrates might be satisfied that no permission was required in respect thereof; (c) alternatively, any operations carried out did not involve development by reason of proviso (a) to s. 12 (2) of the Act; (d) further, or alternatively, the requirements of the enforcement notice (except in so far as they were incapable of performance) had been satisfied (before the beginning of the period allowed for the purpose) on June 24, 1957, and the form of enforcement notice used was inappropriate; (e) it was conceded by the respondents that placing a machine on land might, in some cases, involve a material change of use, but not in this case. It was contended by the appellants that the installation of the machine constituted development within the meaning of s. 12 (2) of the Act of 1947, and, as such, required planning permission under s. 12 (1).

The magistrates were of opinion that (a) it was open to them to determine whether the matters alleged as constituting development had, in fact, occurred and whether, if so, they constituted development within s. 12 (2), and (b) in this case there had been no such development. They accordingly quashed the enforcement notice and the appellants now appealed.

Boydell for the appellants.

J. D. James and Sebag-Montefiore for the respondents.

Curr. adv. vult.

Apr. 30. The following judgments were read.

LORD GODDARD, C.J.: This is a Special Case stated by justices for the County Borough of Eastbourne to whom a complaint was preferred under s. 23 of the Town and Country Planning Act, 1947, asking for an order to quash or vary an enforcement notice relating to premises at 247, Terminus Road in the borough. The notice required the removal of an automatic ice cream sales machine and its attachments from the forecourt of the premises within twenty-one days after the date on which the notice became effective, which was on the

expiration of twenty-eight days from service. The justices held that they had jurisdiction to determine whether or not the matters referred to in the notice constituted development within the meaning of s. 12 (2) of the Act, and determined that they did not.

The only question raised by the Case and argued before this court was whether they had this jurisdiction or not. Section 23 and s. 24 of this Act have been considered by the courts in a number of cases, all of which have raised questions of difficulty; indeed, in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1) VISCOUNT SIMONDS referred to the question there in debate as one of exceptional difficulty, and it is probable that the last word has not yet been spoken on these sections.

The court is indebted to both counsel for their careful arguments in which all the cases bearing on the point have been examined. Section 23 provides for the enforcement of planning control and (by sub-s. (1)) enables the authority, if it appears that any development of land has been carried out after the appointed day without permission, to serve on the owner or occupier a notice called an enforcement notice. Sub-section (2) provides that the notice shall specify the development which is alleged to have been carried out without permission, or, as the case may be, the matters in respect of which it is alleged that any conditions subject to which permission had been granted have not been complied with. Sub-section (4) gives an appeal to a magistrates' court to a person aggrieved by the notice, and provides that, on any such appeal, that court

"(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates."

The question which we have to determine depends, in my opinion, on the construction of the words

"if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof."

Are the court to assume that there has been development and must they confine themselves to considering whether it is development permitted by the Act without permission, or can they go further and decide that there has not, in fact, been any development? I propose in the first place to treat this as a matter of construction, and then to consider what effect, if any, the cases which have been decided on the section have on the conclusion to which I have come.

Reading sub-s. (2) and sub-s. (4) together, para. (a) of sub-s. (4) provides that the court, if satisfied that no permission was required for the development which is alleged to have been carried out without the grant of permission, shall quash the notice to which the appeal relates. Now, although the powers of the court are limited, as has been pointed out in more than one judgment on this paragraph, in my opinion, the court must be entitled to inquire into what the notice describes as development, because, if it is not development within the Act, it follows that no permission was required. Permission to carry out work is not required if it is one of the operations or uses dealt with in the proviso to s. 12 (2). Permission is not required if no material change is made in the use to which buildings or land is being put. If, then, the planning authority alleged that there had been a material change so that permission was required, the court would, as it seems to

me, be bound to consider what the use had been and whether the change alleged by the authority constituted a material change.

In this respect, it is important to have regard to s. 17 of the Act. This section (by sub-s. (1)) enables a person who proposes to carry out any operations or make any change in the use of the land to apply to the local planning authority to determine whether what he proposes would constitute or involve development of the land and, if so, whether an application for permission is required. The effect of sub-s. (2) is to enable the landowner to appeal to the Minister against the determination of the planning authority, and the proviso to that sub-section enacts that where it is decided by the Minister that any operations or use would constitute or involve development his decision shall not be final for the purposes of any appeal to the court under the provisions relating to the enforcement of planning control.

Now s. 23 (4) does give an appeal against an enforcement order, and seems to me to envisage the case where, notwithstanding the decision of the Minister, the landowner carries out that which he proposed and then receives an enforcement order. Notwithstanding the Minister's decision, he is given an appeal to the court and, in that case, it appears to me that the first question the court would have to decide would be whether the proposed operations or use would constitute or involve development. It may be also they could decide that, although it was development, no permission would be required because the work would come within the proviso to s. 12 (2). It follows that, in my opinion, where the court is hearing an appeal under s. 23 (4), it has jurisdiction to consider whether the operations or change of use is development or not.

The opinion that I have formed does conflict with the decision of this court in *Keats v. London County Council* (1). In that case it was held that the justices had no power to determine whether development had taken place but only whether permission for the works or use to which the notice referred had been given or was not required, and, for the reasons which I have just given, I think that, in considering whether permission was not required, the justices must be able to determine that it was not required because the works did not constitute development. It will be observed that s. 17 was not called to the attention of the court in *Keats' case* (1), and that section seems to me to have a most important bearing on the question we now have to consider. Moreover, when *Keats' case* (1) was cited to this court in *Norris v. Edmonton Corpn.* (2) the opinion was expressed that the reasoning on which it was based appeared to conflict with that of the House of Lords in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (3). It appeared to the court that their Lordships had decided that justices have jurisdiction to inquire into the facts in order to see whether development has taken place, and, in this respect, I would call particular attention to the speech of LORD EVERSHED. Accordingly, I think that I am justified in regarding *Keats' case* (1) as one that ought not to be followed, and that I am at liberty to hold that the justices did have jurisdiction to consider whether the matter complained of constituted development.

Reluctant as I am to differ from my brethren who take a contrary view, I feel constrained to maintain my opinion first because I think that the construction which I have placed on these difficult sections avoids the repugnancy to which DONOVAN, J., has referred, and secondly because it enables the owner or occupier to challenge the planning authority's opinion otherwise than by inviting them

(1) 118 J.P. 548; [1954] 3 All E.R. 303.

(2) 121 J.P. 513; [1957] 2 All E.R. 801; [1957] 2 Q.B. 564.

(3) [1956] 2 All E.R. 669; [1957] A.C. 223.

to prosecute him or waiting for them to do so. The decision of the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (1) shows that, on a prosecution, the challenge can be made and must be decided by the justices. The object of s. 17 seems to me to enable the owner to obtain a decision without committing what may prove to be a criminal offence.

The result, therefore, is that the appeal will be allowed.

HILBERY, J.: I have the misfortune to differ from my Lord, and need hardly say that I do so with diffidence; but I have finally arrived at the same opinion as **DONOVAN, J.**, and for the same reasons. As I have had the advantage of reading the judgment that he is about to deliver, it is sufficient if I say that I am in complete agreement with it. I would, therefore, allow the appeal.

DONOVAN, J.: I much regret to find myself differing from the Lord Chief Justice, and I need hardly say that, in consequence, I regard my own conclusions with misgiving. But, though I have searched for the flaw, it still eludes me, and I had better, therefore, state my view at no more length than the subject and the circumstances require.

The Town and Country Planning Act, 1947, defines development, in s. 12 (2), as

"the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

The Act then proceeds to deal with two kinds of such "development": (i) that for which permission is to be required; (ii) that for which permission is not to be required. It also deals with certain operations on, or change of use of, land which are not to be regarded as involving development at all, and are, therefore, outside the Act altogether. These are set out in the proviso to s. 12 (2) and include, for example, works which affect only the interior of a building, or do not materially affect the external appearance. It also follows from the words of the definition that any change in the user of buildings or land which is not a material change is not "development".

In relation to these matters which the Act says are not "development", no question of permission under the Act arises. They are simply not within it. When, therefore, s. 23 (4) comes to pose the question—Was permission under this Act required or not?—it cannot be referring to these operations, as regards which no question of permission or veto under the Act can arise. The inquiry has reference instead to those operations or change of use which, while still constituting "development" under s. 12, may nevertheless be carried out without permission. These include all developments before the appointed day (s. 12 (1)), all the changes of use specified in s. 12 (5), and the operations described in the proviso to s. 12 (3) (b). In these circumstances, I think that it is inaccurate to speak of permission not being required under the Act on the ground that the particular operation or change of use is not "development". For then, as I say, the question does not arise at all. The phrase is apt only to refer to that which is development but which the Act exempts from the necessity for permission.

Coming now to s. 23 (4), it is clear that, under its terms, justices can do one of four things alone: (a) quash the notice if satisfied that permission was granted under Part 3 of the Act for the development in question; (b) quash the notice if satisfied that no such permission was required or that the conditions attached to any such permission have been complied with; (c) vary the conditions of the

notice if satisfied they are to any extent unnecessary; (d) in any other case dismiss the appeal. There is quite clearly within the four corners of s. 23 (4) itself no jurisdiction to inquire whether the alleged development has occurred.

The respondents' argument to the contrary, based on the words of s. 23 (4) (a), is this: The justices are to quash the notice *inter alia* "if satisfied . . . that no such permission was required in respect thereof". The words "in respect thereof" relate back to the expression "development to which the notice relates", and this, in turn, means "development which is alleged to have been carried out without the grant of the permission" required under the Act (see sub-s. (1) and sub-s. (2) of s. 23). So, it is argued, one is dealing under s. 23 (4) simply with "alleged development", and it must be open to the subject to show that the allegation is unfounded and that, therefore, no permission is required. But the real allegation is not "development" but "development without the necessary permission", and, since some development can be carried out without such permission, full effect can be given to the words in s. 23 (4) (a), "if satisfied . . . that no such permission was required" without having to construe them as opening up the whole question whether there was any "development" at all. And, as I have said, where there is no "development", no question of permission or embargo arises. I, therefore, reject the argument.

Stress, however, is laid on the language of the proviso to s. 17 (2), already referred to by the Lord Chief Justice, and I agree that this raises a real difficulty. The only appeal to the court referred to in that proviso is the appeal under s. 23 (4), first to petty sessions and then to quarter sessions. If the proviso had been limited to a determination by the Minister that permission was required, there would be no conflict with the terms of s. 23 (4) at all because that question is expressly within the jurisdiction of the justices, and they are being told by the proviso not to treat the Minister's decision on that point as final. But they are told the same thing by the proviso in a case where the Minister decides that the prospective operations or use will constitute development of the land. Yet, looked at alone, s. 23 (4) confers on the justices no jurisdiction to determine this question at all. The problem, therefore, is how to resolve this repugnancy, and there are only two ways of doing it: (i) to construe s. 23 (4) as though it conferred the jurisdiction in question because of the language of the proviso to s. 17 (2); or (ii) to treat the language of s. 23 (4) as paramount; and the proviso to s. 17 (2) as being, in so far as it contemplates an appeal on the question of development or no development, simply as careless language which is inoperative having regard to the clear terms of s. 23 (4) itself (see hereon MAXWELL ON INTERPRETATION OF STATUTES (10th ed.), p. 229).

I prefer the latter alternative. My reasons are that it is in s. 23 (4) that jurisdiction is conferred and delimited; so that, to find out the limits of that jurisdiction, it is to s. 23 (4) that one would naturally turn. It is not to be expected that Parliament would deliberately confer a very wide jurisdiction by a mere proviso in a section dealing with a different matter, and then go on in the section actually conferring jurisdiction carefully to confine it within narrower limits. Moreover, if s. 23 (4) is regarded as paramount in this particular respect, the proviso to s. 17 (2) does not thereby become empty of content, as I have shown. I think, therefore, that the position must be faced and accepted that, in the one respect now under consideration, the proviso to s. 17 (2) and s. 23 (4) are repugnant provisions; but I think it would do too much violence to the clear language of s. 23 (4) to attempt a reconciliation by enlarging the jurisdiction to accord fully with the proviso. If two sections of an Act are repugnant, the general rule is that the last must prevail; and an enacting power cannot, as a

rule, be implied from the language of a proviso: see on these matters *Wood v. Riley* (1) and *Arnold v. Gravesend Corpn.* (2).

A further consideration is this: The Act makes certain elected local authorities the persons who are to plan and control development. By s. 5 of the Act, these authorities must carry out surveys of their areas and submit to the Minister development plans which may allocate certain areas for agricultural, residential or other purposes. The development plans may be approved by the Minister with or without modifications. Provision is made for the hearing of objections, and local inquiries may be ordered. Unless it is contended by somebody that the plan is invalid under the terms of the Act, it is not open to question in any legal proceedings (s. 11 (3)). If local benches of justices, on whom none of these duties is placed, can override the planning authority on the question whether something is "development" or not, it is obvious that they can interfere with all development plans, and that a large measure of planning control (as distinct from enforcement) has been placed in their hands. Had this been Parliament's intention, I cannot believe that it would have been effected by a mere proviso in a section dealing with a different subject-matter. I should have expected provisions as clear and explicit as those by which the justices' jurisdiction as to enforcement is expressed and limited in s. 23 (4). In my respectful opinion, therefore, the decision in *Keats v. London County Council* (3) is correct, although no argument on the proviso to s. 17 (2) was presented to the court.

In *Norris v. Edmonton Corpn.* (4), however, this court said that the decision in *Keats' case* (3) must be regarded as overruled as being inconsistent with the reasoning of the subsequent decision of the House of Lords in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (5). Counsel for the present appellants, however, contended before us that there was no such inconsistency. It is common ground that in this latter case there was no express disapproval of the decision in *Keats' case* (3), which was cited to their Lordships in argument; but the contention of inconsistency is supported by the present respondents in this way: To arrive at its decision the House of Lords in the *East Riding case* (5) had to regard justices as free to go behind the enforcement notice to ascertain whether there had been development within the meaning of the Act of 1947. The justices would then find that there was not, because it had all taken place before the appointed day. But this cannot be reconciled with the decision in *Keats' case* (3) that justices may not go behind the notice to inquire whether there has been "development". If, therefore, they may do this, then they were entitled to do so in the present case, and, as a result, they found that no development had occurred.

In the circumstances, it is necessary to examine the matter in some detail. The short facts of the *East Riding case* (5) were these: There had, admittedly, been development of the land in question, but it had all been carried out, again admittedly, before the appointed day, namely, July 1, 1948. That being so, while it did not cease to be "development", it was development for which permission was not required under Part 3 of the Act: see s. 12. Nevertheless, the East Riding County Council served an enforcement notice on the occupier stating that this development was "in contravention of planning control" and requiring that it should be discontinued. The occupier made two answers: (i) that the development having been carried out before the appointed day the

(1) (1867), L.R. 3 C.P. 26.

(2) (1856), 20 J.P. 358; 2 K. & J. 574.

(3) 118 J.P. 548; [1954] 3 All E.R. 303.

(4) 121 J.P. 513; [1957] 2 All E.R. 801; [1957] 2 Q.B. 564.

(5) [1956] 2 All E.R. 669; [1957] A.C. 223.

justices, on appeal to them under s. 23 (4), should have quashed the notice in exercise of their express jurisdiction to do so under the sub-section in the case of development for which, under Part 3 of the Act, no permission was required; (ii) that the notice was so defective in form that it was a nullity. The East Riding County Council contended that, although the development had taken place before the appointed day, they were, nevertheless, entitled on the facts to invoke s. 75 of the Act of 1947, and, therefore, to treat the development as contravening the Act of 1947. As to this, it was held that, not having mentioned s. 75 in the notice, they were not entitled to take the point. For the purposes of the present case, that is all that needs to be said about s. 75. The county council then disputed, for various reasons, that the notice was a nullity, and into these it is unnecessary for present purposes to go.

On the case made for the occupier VISCOUNT SIMONDS, LORD COHEN and LORD EVERSHED agreed that the justices should have quashed the notice on the ground that the development, by reason of its date, required no permission under Part 3 of the Act. In this respect, s. 23 (4) confers express jurisdiction on the justices. VISCOUNT SIMONDS also thought that the notice was in any event not a notice on which the county council could rely because of its defects. LORD MORTON OF HENRYTON thought that the notice was a nullity. He doubted whether the justices had power to quash it, but, as the practical effect was the same, concurred in the motion to dismiss the council's appeal. LORD RADCLIFFE took the same view.

In considering whether the reasoning of their Lordships is inconsistent with the Divisional Court's decision in *Keats'* case (1), it may be observed first of all that the question for decision in each case was different. In *Keats'* case (1), the question was: Can the justices, under the terms of s. 23 (4), inquire into the question whether there has been development at all? In the *East Riding* case (2), the question was: Did the development, which had admittedly taken place, require any permission under Part 3 of the Act? *Prima facie*, therefore, one could answer this second question either way without disturbing the decision in *Keats'* case (1).

Next, as to the actual reasoning in the *East Riding* case (2), VISCOUNT SIMONDS said, adopting what the Lord Chief Justice had said in *Lincoln County Council (Parts of Lindsey) v. Henshall* (3), and applying it to the case under consideration:

"The justices had power to quash in the present case because no such permission was required in respect of work which was done before July 1, 1948."

LORD COHEN said:

"... the respondents proved that no such permission was required in respect thereof, i.e., in respect of 'the development to which the notice relates'. The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so."

LORD EVERSHED said:

"The words in s. 23 (4), 'no such permission was required in respect thereof', are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was

(1) 118 J.P. 548; [1954] 3 All E.R. 303.

(2) [1956] 2 All E.R. 669; [1957] A.C. 223.

(3) 117 J.P. 321; [1953] 1 All E.R. 1143; [1953] 2 Q.B. 178.

carried out, was outside the scope of the Act altogether . . . I think the Court of Appeal and the Divisional Court were right in holding that, in the circumstances and on its true construction, the enforcement notice . . . ought to have been quashed by the justices."

So far, I have not been able myself to find in the reasoning of their Lordships anything inconsistent with the decision in *Keats'* case (1). It is true that in his speech LORD EVERSHED also said this:

"But other cases may well arise in which serious questions of fact might be involved, questions whether, in truth, the development had been carried out before the appointed day, or whether the land had, in fact, ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices on an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under s. 24 of the Act, and then to challenge the validity of the notice; a course which might well involve him in a long period of uncertainty, and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all."

When LORD EVERSHED uses the words "or whether the land had, in fact, ever been used as alleged" he does, indeed, pose the same kind of question that was answered in *Keats'* case (1). But he does not go on to answer it in a sense inconsistent with that decision, or, indeed, at all. And, when reading this passage, it is useful to recall his earlier remarks:

"It cannot, I think, be doubted that the terms of s. 23 (4) (a) and the formulation of the three grounds on which a notice under the section may be quashed, assume the premise on which the notice proceeds—viz., that the matters complained of have been done, or undertaken, since July 1, 1948. The relevant words 'that no such permission was required in respect thereof,' according to their more natural meaning, refer to those cases in which, by virtue of s. 12 (5), the development is of the limited character for which permission is excused. On the face of it, the sub-section makes no provision for the case where the development alleged has not occurred in fact at all."

With diffidence, therefore, I think the reasoning of the speeches in the *East Riding* case (2) is not inconsistent with the decision in *Keats'* case (1); indeed, that it harmonises with it. It is not the case, as counsel for the present respondents suggests, that the House of Lords regarded justices as free to go behind the enforcement notice in order to decide whether there had been development or not. But where the question is whether the development took place before the appointed day, justices must necessarily inquire into the facts in this respect, for the date of the development will determine whether permission was, or was not, required under the Act, and this matter is within the jurisdiction expressly conferred on justices under s. 23 (4) (a). The decision in the *East Riding* case (2), in my view, involves no more in this particular direction. At the same time, it is noteworthy that all their Lordships emphasised the strictly confined nature of the jurisdiction conferred on justices by s. 23 (4).

(1) 118 J.P. 548; [1954] 3 All E.R. 303.

(2) [1956] 2 All E.R. 669; [1957] A.C. 223.

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The question then arises whether the contrary view expressed by this court in *Norris v. Edmonton Corpn.* (1) still binds us. The decision followed that of this court in *Perrins v. Perrins* (2), and that decision was specifically overruled by the Court of Appeal in *Francis v. Yiewsley & West Drayton U.D.C.* (3). *Norris v. Edmonton Corpn.* (1), therefore, must also be regarded as no longer law. But the Court of Appeal reached its decision on a different ground, involving no necessary conflict with the reason which led the Divisional Court to its decision in the *Norris* case (1). Nevertheless, now that the decision itself has gone, no useful purpose would, it seems to me, be served by regarding its reasoning as still binding. I agree that it is a peculiar position if the occupier has to wait to be prosecuted before he can challenge the planning authority's view that development has occurred, and that, as the law stands at present, the justices will then do under s. 24 (3) what they cannot do under s. 23 (4), namely, inquire whether development has occurred. But at least that is better for the occupier than nothing at all; and, in some cases, he may also be able to proceed for a declaratory judgment. However that may be, I think the words of s. 23 (4) strictly confine the justices' jurisdiction under that sub-section to the issues there specified.

The ultimate result I reach is, therefore, this: (i) The decision in *Keats'* case (4) still binds this court. (ii) Accordingly, in the present case, the justices had no jurisdiction under s. 23 (4) to consider whether the alleged development had, in fact, occurred, and to decide that it had not. (iii) That the appeal must, accordingly, be allowed, there being no other question before us.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for Town Clerk, Eastbourne; *Clifford-Turner & Co.*

T.R.F.B.

(1) 121 J.P. 513; [1957] 2 All E.R. 801; [1957] 2 Q.B. 564.

(2) 115 J.P. 346; [1951] 1 All E.R. 1075; [1951] 2 K.B. 414.

(3) 122 J.P. 31; [1957] 3 All E.R. 529.

(4) 118 J.P. 548; [1954] 3 All E.R. 303.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 17, 21, 22, 1958

FYSON v. BUCKS COUNTY COUNCIL
METAL RECOVERY AND STORAGE CO., LTD. v. SAME*

Town and Country Planning—Enforcement notice—Alleged discontinuance of use of land and commencement of new use—No material change in use—Long interval of interruption of use—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 23.

Enforcement notices under s. 23 of the Town and Country Planning Act, 1947, were served on the owners and occupiers of a site, who appealed, as persons aggrieved by the notices, to a magistrates' court under s. 23 (4). The site was requisitioned in 1943 and remained requisitioned until Dec. 1, 1950. During the period of requisition it was used, among other purposes, for the storage of materials. From

*The two appeals were heard and decided after the arguments, but before the judgment in *Eastbourne Corporation v. Fortes Ice Cream Parlour, Ltd.* (ante p. 324).

May, 1949, to December, 1956, the site was not used at all, except from December, 1953, to March, 1954, when it was again used for storage purposes. After about July, 1956, it was again used for storage purposes by the owners and occupiers. The justices found that there had been no material change in the use of the land since the appointed day (July 1, 1948), but dismissed the appeals on a ground which the planning authority did not seek to support on appeals by the owner and occupier to the Divisional Court. They contended, however, that the justices' decision could be supported on another ground, namely, that the previous use of the land had been discontinued and a new use began in July, 1956.

HELD: that, even though the land had been for some years put to no use, the justices were fully entitled to come to the conclusion that since the appointed day there had been no material change in the use of the land, and that on that finding the appeals must be allowed.

CASES STATED by justices for the county of Buckingham in respect of their adjudication as a magistrates' court sitting at Amersham.

On June 18, 1957, the appellant, John Russell Fyson (hereinafter called "the appellant Fyson"), appealed pursuant to the Town and Country Planning Act, 1947, s. 23 (4), by complaint for an order to quash, or, alternatively, vary, an enforcement notice dated May 27, 1957, and issued by the Amersham Rural District Council (hereinafter called "the Amersham Council") on behalf of the respondents, the Buckinghamshire County Council. On the same day a similar complaint against the same form of notice was made on behalf of the appellants, the Metal Recovery and Storage Co., Ltd. (hereinafter called "the appellant company") by one Gray, a director thereof. The enforcement notice required the discontinuance of the use of certain land at Copperkins Lane, Amersham, and of the buildings erected thereon for industrial purposes, viz., metal recovery storage and trading, and was served on the appellant Fyson as owner and on the appellant company as occupiers thereof.

At the hearing at Amersham Magistrates' Court on July 26, 1957, the following facts were found. The land to which the enforcement notice related (hereinafter called "the appeal site") comprised about two and a half acres on the north side of Copperkins Lane opposite a brickworks. In or about June, 1943, the appeal site was requisitioned by the Ministry of Works on behalf of the Ministry of Supply and remained requisitioned until Dec. 1, 1950. During the requisition, from about July, 1943, to April, 1949, the appeal site (including buildings which were erected on it) was used by and on behalf of the Ministry of Supply for various purposes, and no application was made under the planning legislation then in force in respect thereof. In 1950 the appellant Fyson entered into negotiation with the agents for the then owner for the purchase of the appeal site, including the buildings thereon. The appellant Fyson agreed with the Ministry of Works to accept the de-requisition of the appeal site and buildings in their existing state at Dec. 1, 1950, in lieu of compensation under the Compensation (Defence) Act, 1938, s. 2 (1) (b), and the appeal site was conveyed to the appellant Fyson on May 9, 1951. From May, 1949, to June, 1956, the appeal site was unoccupied save that a few items of equipment and stores were left on it and that from the end of 1953, the appellant Fyson stored chemicals on it and from December, 1953, to March, 1954, used it for the reception, grading and repacking and despatch of starch. Since about July, 1956, the appeal site had been occupied by the appellant company who had used it in the course of their business for the receipt and storage of materials such as grease and paper, for the storage and recovery of metals, timber and machinery, and for similar purposes. None of these purposes was different from the user during requisition. In so far as it was a finding of fact, there had been no material change in the use of the appeal site (or the buildings thereon) since July 1, 1948, the appointed day under the Town and Country Planning Act, 1947. The appellant Fyson and

the appellant company admitted that, during the period of requisition, the appeal site was subject to such a right of possession by or on behalf of the Crown as to render planning control unenforceable as mentioned in the Building Restrictions (War-Time Contraventions) Act, 1946, s. 7 (6), and that no express planning permission had been granted under the Town and Country Planning Act, 1947, or under previous planning legislation.

It was contended by the appellants that (i) the enforcement notice must be read as alleging development of the appeal site by making a material change of use since July 1, 1948, and was not based on an allegation of a contravention of previous planning control or of failure to comply with conditions; (ii) the uses complained of were metal recovery storage and trading also described as industrial and all were, in fact, within the existing use at the appointed day; (iii) any development had taken place before the appointed day under previous control of the Town and Country Planning Act, 1932, and there had been none since the appointed day under Part 3 of the Town and Country Planning Act, 1947, and, therefore, no permission was required in respect thereof under the latter Act; (iv) accordingly, the enforcement notice should be quashed under s. 23 (4) (a) of the Act of 1947; (v) if, in respect of any part of the appeal site, the justices were not satisfied within the meaning of s. 23 (4) (a), they should vary the notice so as to refer only to that part, as mentioned in s. 23 (4) (b) of the Act of 1947; (vi) the justices were not bound to assume that the development alleged in the enforcement notice had taken place. It was contended by the respondents that the use of the premises for purposes of the recovery, storage and trading of and in metal and other materials having ceased in May, 1949, it was not open to the respondents to serve an enforcement notice thereafter under s. 23 of the Act of 1947, or under that section as applied by s. 75 of that Act, as such notice would have had to require the discontinuance of a use which had already ceased. If and so far as mere cesser might not immediately amount to discontinuance, the continued cesser of the user from May, 1949, amounted to a discontinuance. Once the use, for which it was admitted no permission existed under any of the Town and Country Planning Acts, was discontinued, it ceased to have any effect for the purposes of these Acts, in the same way as would have been the case had it been discontinued pursuant to a notice, and the use of the premises for the storing of starch and chemicals from December, 1953, to March, 1954, constituted development for which planning permission was necessary. Similarly, on the cesser and discontinuance of this use in March, 1954, it was not open to the respondents to serve any enforcement notice, and this unauthorised use ceased to be of any effect, in the same way as would have been the case had it been discontinued pursuant to a notice. The use commenced by the appellant company in August, 1956, accordingly constituted development under the Town and Country Planning Act, 1947, for which planning permission was required but had not been obtained. A mere transitory unauthorised use of a few months discontinued before service of an enforcement notice could not preclude a local planning authority from ever thereafter serving an enforcement notice if the premises were again used after a lapse of four or more years for the same or similar purposes. The justices were of opinion that, as there had been no material change of use since the appointed day, no permission was required under Part 3 of the Act of 1947 for the present user of the appeal site, and would have quashed the enforcement notice, but they dismissed the appeals on another ground, viz., that there had been a determination under the Building Restrictions (War-Time Contraventions) Act, 1946, and that the appellant Fyson should have pursued his remedy by appeal to the Minister under that Act but, instead, allowed his

appeal to lapse. This ground was abandoned on appeal to the Divisional Court, it being conceded that the decision of the justices could not be supported on this ground.

J. D. James and Sebag-Montefiore for the appellants.

J. S. Daniel for the county council.

DONOVAN, J., delivered the judgment of the court: The respondents argue that the previous use was discontinued and that a new use was begun in 1956, when the land was used once more for storing purposes. The justices, however, found expressly against this contention and, their finding being one of fact, it is conceded that it must prevail unless it is one to which the justices could not reasonably have come. I think that it is impossible to say that. Reliance was placed on the decision in *Postill v. East Riding County Council* (1) where this court held that the use of land for an itinerant circus was discontinued when the circus departed at the end of the season, and that, therefore, there had been compliance with a condition for discontinuance subject to which the planning permission had been given, albeit the circus came back in the next year. The difference in the facts is obvious. In the present case, the land has been in the ownership of the appellant *Fyson* since 1951, and there has never been any use of the land since 1943 by anyone except for the purpose of the storage of materials. All that has happened is that there has been a rather long interruption of that use, but without any change of use. Indeed, the question here is not, as it was in the *Postill* case (1), whether a particular use has been discontinued, but is, to use the language of s. 12 (2) of the Town and Country Planning Act, 1947, whether, since July 1, 1948, there has been any material change in the use of the land. To my mind there clearly has not been such a change, even though for some years the land was put to no use. I think that the justices were fully entitled to come to the decision which they did reach. It is said that certain provisions of the Act of 1947, notably s. 12 (5) (c), will not make sense unless the decision of the justices in this respect is reversed. If that be so, it is a matter for Parliament. Problems under this Act will become even more difficult than they are already, and perhaps even insoluble, if each time a construction has to be sought which will resolve every discord into song. Here we have simply a question of fact whether the justices were entitled to decide as they did. Both appeals should be allowed.

Appeals allowed.

Solicitors: *Mills, Lockyer & Co.*, for *Blaser, Mills & Lewis*, Chesham, Buckinghamshire; *R. E. Millard*, Aylesbury, Clerk to *Buckinghamshire County Council*.

T.R.F.B.

(1) 120 J.P. 376; [1956] 2 All E.R. 685; [1956] 2 Q.B. 386.

CHANCERY DIVISION

(HARMAN, J.)

February 28, March 3, 1958

LITHERLAND URBAN DISTRICT COUNCIL *v.* LIVERPOOL CORPORATION AND ANOTHER

Local Government—Transport undertaking—Free travel—Concessions for aged persons—Undertaking operating in area of another council—"Cost incurred . . . in . . . granting . . . travel concessions" in that area—Basis of calculation—Public Service Vehicles (Travel Concessions) Act, 1955 (3 and 4 Eliz. 2, c. 26), s. 1 (4).

The defendant corporation operated a transport undertaking in certain local government areas, including that of the plaintiff council. Under the Public Service Vehicles (Travel Concessions) Act, 1955, s. 1 (1), the defendant corporation granted free travel concessions to old people and certain other "qualified persons" as defined in s. 1 (2) of the Act, and a certificate of the appropriate licensing authority defining the nature and extent of the travel concessions had been obtained under s. 1 (3) of the Act. The persons who qualified for the concessions were issued with passes and were allowed free travel during the permitted hours. By s. 1 (4) of the Act the council in whose area another local authority ran public service vehicles might contribute to any "cost incurred . . . in . . . granting . . . travel concessions" in that area. On the question of the basis on which such "cost incurred" was to be calculated,

HELD: by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare-paying passengers and pass-holders it was possible to calculate the share of the total cost of the undertaking attributable to each passenger journey whether made by a fare-paying passenger or a pass-holder, and this was the basis on which the "cost incurred" was to be calculated so as to arrive at the sum to which the plaintiff council was, by s. 1 (4) of the Act, permitted to contribute.

ADJOURNED SUMMONS.

The plaintiff, the Litherland Urban District Council, applied to the court by originating summons for the determination of the following questions (among others) and certain relief under R.S.C., Ord. 54A, r. 1A: (i) Whether on the true construction of the Public Service Vehicles (Travel Concessions) Act, 1955, and in particular s. 1 (4), the extent to which the plaintiff council might contribute to any cost incurred by the defendant corporation in granting travel concessions to qualified persons in connexion with the public service vehicles undertaking operated by the defendant corporation in (among others) the local government area of the plaintiff council was to be ascertained (a) by reference to the amount of any expenditure incurred by the defendant corporation in respect of its undertaking which would not have been incurred if the concession had not been granted, or (b) by reference to the amount of the revenue lost by the defendant corporation in respect of its undertaking in consequence of the granting of such concessions, or (c) in some other, and (if so) what way.

Rowe, Q.C., and D. B. Buckley for the council.

Lamb, Q.C., and E. W. Griffith for the corporation.

Lightman, Q.C., and J. V. Nesbitt for the second defendant, a ratepayer of the district council.

HARMAN, J.: This originating summons was taken out under R.S.C., Ord. 54A, r. 1A, for the purpose of construing the Public Service Vehicles (Travel Concessions) Act, 1955, and the body which seeks the guidance of the court on the construction of the statute is the Litherland Urban District Council. Generally speaking, as the council comes to the court to ask whether a certain

expenditure is or is not legal on the true construction of the Act, the proper defendant, one would think, would be a ratepayer within the area, and, indeed, a ratepayer is a respondent. There is added as defendant the Liverpool Corporation. That arises out of the curious circumstance that the payment to be made is one that is being asked for by the Liverpool Corporation, though admittedly the corporation has no power to enforce the payment. It is in fact a permissive power on the part of the council which it desires to exercise in a proper manner which will be unquestionable by any of its ratepayers, but which, as the matter stands, has also to be acceptable to the corporation. What the position may be between the council and the corporation with regard to the subject of payment is not here to be decided, and I say no more about it.

In and before 1954, a number of local authorities were running bus or trolley bus or tram services, and it had become a comparatively common feature of those services that certain concessionary fares were allowed. I think all transport undertakings have always allowed children to travel at half price. Most of them, when obtaining powers to run such a service, have had enjoined on them a duty to grant workmen's tickets at certain hours of the morning. But the concessions which were brought into issue before this court went beyond that and were concessions to persons disabled, ex-service men and others, and, secondly, to what VAISEY, J., in *Prescott v. Birmingham Corpn.* (1) called "old people"—moreover, it was a certain class of old people—those entitled to contributory pensions.

In the case of the city of Birmingham, those concessions were challenged by a ratepayer and brought to issue in the court in *Prescott v. Birmingham Corpn.* (1). Both the learned judge and the Court of Appeal in that case came to the conclusion that the scheme which the Birmingham Corporation was operating was ultra vires and illegal. Having regard to the widespread use of schemes of this sort, this decision created a very awkward position in municipal finance, and, in order to clear the matter up, Parliament thought right to enact the statute which I have already mentioned.

The statute gives a kind of indemnity for past illegal acts, but it does more than that, for it provides, by s. 1 (1), that any local authority operating a public service vehicle undertaking may "make arrangements" for the granting of concessionary fares. The permission given was not unlimited. It was only to be given to persons qualified under s. 1 (2), and it was only to legalise what were called "established travel concessions", i.e., no new ones could be invented: they must be proved in the way the Act provides to have been in operation in 1954 not later than Nov. 30. "Qualified persons" are defined as including men over the age of sixty-five years and women over the age of sixty years.

Liverpool Corporation had been one of those who had been granting certain concessions, and, therefore, was within the net cast by *Prescott v. Birmingham Corpn.* (1). It took the proper steps to have its established travel concessions decided by the traffic authority in the way the Act provides, and continued to grant those concessions. But there is a complication. The corporation runs buses not only within the area of the City of Liverpool but in several areas outside the city, for instance, Bootle and in the Litherland urban district. However the concessions should be described in terms of money, the figure of loss or the cost of them, as the case may be, falls on the ratepayers of Liverpool, and does not fall on the ratepayers of the district outside the city which has enjoyed the facilities. It was therefore thought right by Parliament, when legalising these concessionary fares to legalise also contributions to be made by authorities

(1) 119 J.P. 48; [1954] 3 All E.R. 698; [1955] Ch. 210.

outside the operating area as a matter of fairness and equity, and the present question centres entirely round that power.

Section 1 (4) provides:

"The council of a county borough or county district in whose area another local authority run public service vehicles may contribute to any cost incurred by that other local authority in the granting to qualified persons of travel concessions in that area."

Thus is made legal that which otherwise would not be within the power of the council, i.e., to pay a proper contribution for the facilities granted to those paying rates or those resident in its area. I am told that in fact the service in the Litherland area is provided in part by Liverpool Corporation and in part by a state-owned enterprise, and the concessions are not offered by the latter: so that the residents of Litherland do not get all the facilities which they might get if they lived within the City of Liverpool. Nevertheless, it is a valuable thing for the old people to be able to get into the centre of the city without paying a fare, and it seems appropriate that the council should bear its proportion of the expenditure as the burden arising out of that advantage.

The question is: what is the meaning of the words "any cost incurred by that other local authority"? The other local authority in this case is Liverpool Corporation. The travel concessions granted are in the Litherland area, and what is questioned by the council is what the cost of that is to the corporation.

It seems clear enough that, if a proportion of passengers is carried free, it must cost something. If all passengers were carried free, clearly the whole expense of the transport undertaking would be borne out of the rates. If a proportion is carried free, a portion of the expense has to be borne out of the rates, and that may be said to be what it costs to grant the concession.

In the negotiations which have preceded this action, the corporation argued that it lost this or that amount of revenue by granting these concessions and that was the cost. To that the retort was that loss of revenue was not cost: it was not an expense: that which one does not receive is not what one pays. That seems to me to be quite a logical answer to the way in which the corporation preferred to put its case: but it also put it in another way. It suggested that the matter be regarded from the point of view of the expense of carrying passengers in the aggregate: so, for instance, if all the passengers carried in a given period are calculated on one side, and the expense of the undertaking for the same period is calculated on the other, the average amount which it costs to carry a passenger can be arrived at, and if a number of those passengers are carried for nothing, it is not, says the corporation, incorrect to say that the cost of so doing may be equated to the aggregate average cost of carrying that number of passengers. In other words, the cost of granting travel concessions in the Litherland area to the qualified persons in that area is the expense of so doing having regard to the fact that it costs you X pence to carry each passenger you carry.

There are answers to that made by the council, viz., that this postulates a number of totally assumed figures. For one thing, it says, it is not true to say that a person in Litherland will take the same average number of journeys, or the same average length of journeys, as a person living in the middle of the city. Still more is it uncertain whether the privileged class would take, if they were not of that class, the same number of journeys which they take when they get them gratis, and that is an incalculable figure. Thirdly, the gross expenses of running the whole undertaking are not properly attributable to the privileged class in the urban district of Litherland. Therefore, it says, the figure so

reached is not cost at all, but a mere estimate, and a speculative one at that.

Another objection is made by the council to the way in which the corporation wishes to cost the concessionary travel. It says that assuming that the bus could be filled on any given journey, the fact that one of the persons travelling on the bus is a person who travels on a pass and not on a ticket does not make any difference to the cost of the journey to the undertakers. Only if it could be proved that, if that seat were not so occupied, it could be filled by a paying passenger, could it be postulated that a cost had been incurred. The council says that before it can be authorised under s. 1 (4) to pay, it must be shown that the corporation has spent X pounds on extra buses, Y pounds on extra conductors and Z pounds on extra petrol and oil, and so forth, and that these things are the cost to the corporation of the granting of travel concessions to the qualified persons of Litherland and no other.

Between those two views, I have to decide. It is pointed out to me that the words "cost . . . of granting the concessions" are to be found in sub-s. (5) and again in sub-s. (6), and that in sub-s. (8) the word "expenditure" seems to have taken the place of "cost". That must mean net expenditure, because in a sense running the bus service if it broke exactly even would cost the rates nothing.

I do not think "cost" here is expenditure in that sense. I think "cost" must mean gross cost and not the outgoings less the expenditure. Moreover, it is urged on me by counsel for the council that in considering what "cost" means I ought to look at certain authorities, and notably *Ferrier v. Scottish Milk Marketing Board* (1), where their Lordships had to deal with a similar expression. That was a case about the production of milk. The objector said that certain deductions made by the board did not represent the cost of operating the scheme, and their Lordships' House held him to be right. LORD ATKIN said:

" 'Costs of operating the scheme' in ordinary language must mean expenditure or liability which if not recouped would fall upon the board; they cannot include in my opinion sums which represent no expenditure or liability of any one but which are levied upon all milk producers . . . "

LORD MACMILLAN said:

"The critical words in the present case—'the costs of operating the scheme'—are in my opinion quite inapt to cover the compensatory levy which the appellant challenges. That the respondents obtain a lower price for milk sold for manufacturing purposes than is obtained for milk sold in the liquid market is doubtless the case. But this is an incident of the scheme, not a 'cost' of operating it. They have not incurred any 'cost' by selling milk in the manufacturing market. There has been no disbursement on their part."

Those observations might be most relevant if I were eventually to deal with these matters on the primary view put forward on behalf of the corporation, viz., that "cost" here means that which is not received having regard to the concessions made. There is a formal sense of the word "cost" which involves no expenditure: it is the cost of something done. If something is done free of charge, it will have cost the person doing it what might have been paid for it. But I do not think that "cost" here can mean that. I think that it must mean expenditure. I do not, however, see that it is not a legitimate way of finding the cost of operating the scheme to find what it costs to carry any particular passenger as a matter of average in the area of this undertaking.

Eng Rev

Having done so, it may be said that, if you carry passengers free, each one of them costs the operator that much. In the end it may turn out that, whichever view is taken, it does not make very much difference, but I think that that is the way in which it should be done if it is legitimate to do it at all.

In my judgment, Parliament intended that cost should be ascertained in some such way. After all it was the position produced by *Prescott v. Birmingham Corpn.* (1) which Parliament was studying. In that case it was said that the cost of operating the scheme was on an estimate some £90,000. How that was arrived at does not appear, but it was clearly not arrived at in the way which the council put forward as their view of the words in the Act. It is quite true that there is an element of speculation which comes into the calculation, and it may be that it is rather rough and ready, particularly having regard to the possibility that those who travel free will travel more because they do not have to pay. Nevertheless, it does not seem to me to be unfair to do it on an average basis. There is no other way in fact of doing it, and with that the council agree. The council says that as no particular item can be put forward as an expense which has been incurred, the council is not in a position to pay anything. In my judgment, that is not the true way of construing this Act of Parliament. I propose to accede to the argument of the corporation, not exactly as they preferred to put it during most of the proceedings, but in accordance with the alternative view put forward in Mr. Ainsworth's affidavit where he says:

"... by dividing the total expenditure of the undertaking for the year by the total number of journeys made by fare paying passengers and pass holders it is possible to calculate the share of the total cost of the undertaking attributable to each passenger journey whether made by a fare paying passenger or pass holder."

That is a basis on which the matter might be fairly calculated. I propose to answer in that sense the question posed by the summons.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.* for Clerk to *Litherland U.D.C.*, Lancaster; *Cree, Godfrey & Wood* for Town Clerk, Liverpool.

R.D.H.O.

(1) 119 J.P. 48; [1954] 3 All E.R. 698; [1955] Ch. 210.

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COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 21, 1958

R. v. EDGAR

R. v. PARR

R. v. PONTIKA

R. v. ROONEY

Criminal Law—Committal for trial—Validity—Some depositions not signed by examining justice—Other signed depositions sufficient to justify committal for trial on some charges—Magistrates' Courts Rules, 1952 (S.I. 1952, No. 2190), r. 5 (2).

Rule 5 of the Magistrates' Courts Rules, 1952, made under s. 15 of the Justices of the Peace Act, 1949, as extended by s. 122 of the Magistrates' Courts Act, 1952, provides: "(1) A magistrates' court inquiring into an offence as examining justices shall cause the evidence of each witness, including the evidence of the accused, but not including any witness of his merely to his character, to be put into writing; and as soon as may be after the examination of such a witness shall cause his deposition to be read to him in the presence and hearing of the accused, and shall cause the witness to sign the deposition. (2) One of the examining justices shall sign the depositions."

An examining justice, who was inquiring into charges against the appellants and others of breaking and entering and receiving, spent three days in taking depositions. He duly signed the depositions taken on the first and third days, but, owing to an oversight, omitted to sign the depositions taken on the second day. The appellants were committed for trial on all the charges laid against them. The signed depositions were sufficient to justify committal on certain charges of receiving (subsequently reproduced in counts 2 and 3 of the indictment), but not on the other charges. The judge at the trial quashed counts 1 and 4, which were based on the unsigned depositions. The appellants were convicted on counts 2 and 3.

HELD, that the committal for trial on these counts was valid, as there was sufficient evidence in the signed depositions to justify it, and was not invalidated by reason of the irregularity arising from the unsigned depositions which affected other counts, and, therefore, the convictions would be affirmed.

APPEALS AGAINST CONVICTION.

The appellants and two other men were indicted at the Central Criminal Court on an indictment containing four counts. The first count charged all of them, except the appellant Pontika, with breaking and entering certain premises with intent to steal and stealing therein certain property. The second count charged all of them with receiving a quantity of property knowing it to be stolen. The third count charged the appellant Rooney with receiving two pieces of property knowing them to be stolen. The fourth count charged him with receiving certain other property. The case was heard before the examining magistrate on three different days. On the first occasion a police officer gave evidence against the appellants with regard to statements that they had made. On the second occasion several witnesses were examined as to the facts of breaking and entering and receiving, and on the third occasion another police officer gave evidence. The evidence given by the two police officers was concerned with the charges of receiving but not with the charge of breaking and entering. On the second occasion, viz., on Dec. 17, 1957, the examining magistrate did not sign the certificate or jurat to the depositions through some mishap or oversight; but the certificates or jurats to the depositions taken on the first and third days were signed by the examining magistrate. The depositions taken on the second day included a substantial amount of evidence relative to the charges of receiving. On motion to the trial judge to quash the indictment he held that the evidence given by the police officers on the first and third days did not establish a *prima facie* case of breaking and entering, but did establish one of receiving on counts two

and three. Accordingly he quashed count one which was against all the prisoners except Pontika. Count four, which was against the prisoner Rooney alone, was also quashed. The appellants were tried and were convicted on the counts of receiving stolen property. They appealed against their convictions.

Miss P. G. Coles for the appellant Edgar.

M. D. L. Worsley for the appellants, Parr and Pontika.

Harkess for the appellant Rooney.

Hazan for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court, in which, after stating the counts on which the appellants had been indicted, he said: The objection that has been taken in this case is of the highest technicality, but there is nothing wrong in that, for counsel are entitled to take every technical objection which they can on behalf of their clients. The Administration of Justice Act, 1933, abolished grand juries and substituted for presentments to grand juries committal for trial by magistrates. Before the Magistrates' Courts Act, 1952, came into operation magistrates, when proceeding to act as examining justices, were governed by the Indictable Offences Act, 1848; since the Act of 1952 came into operation, they are governed by that Act. Rule 5 (1) of the Magistrates' Courts Rules, 1952, provides that, when a deposition is taken, it is to be read over to the deponent and signed by him; and, by r. 5 (2), the deposition is to be signed by the examining justice. That is to authenticate the document, so that there is no question about its being the deposition of the witness.

[His LORDSHIP referred briefly to the facts and continued:] Counsel moved to quash the indictment on the ground that the committal was a bad committal, because the Rules of 1952 were not complied with. A long discussion took place and many cases were cited, but, when the matter comes to be decided, the point is a simple one. The magistrate signed the deposition of the police officer on the first occasion when the matter came before him, and he also signed the deposition of another police officer on the third occasion when the case was before him. The evidence given by those two officers against the appellants would have justified committal for trial. The question, therefore, is whether the fact that certain depositions were taken which were not signed renders the whole committal bad. In the opinion of the court, it does not. We are assuming that those depositions were admissible for any purpose for which a deposition could be read or used; we are also assuming that, if a magistrate has evidence of witnesses taken before him and has not signed the depositions, those depositions would not be usable for committal for trial. I am far from saying, however, that they might not be brought back to the magistrate to be signed, at any rate before the commission day of the assizes; but we need not go into that. It is perfectly clear that there was before the magistrate the evidence of the two police officers, which, was enough to justify the magistrate in committing the appellants. The fact that there were also the depositions which were not signed and that that was an irregularity cannot affect the question. The whole question in this case is whether the committal of the appellants was a good committal. The learned commissioner held that it was a good committal, except with regard to count one, because the evidence given by the police officers dealt with the charge of receiving but not with the charge of breaking and entering. Therefore, the commissioner said that there was evidence on which the magistrate could commit for receiving, though he could not commit for breaking and entering, and he quashed the count for breaking and entering. He also quashed the fourth count against the appellant Rooney. CASSELS, J., who was sitting at the Old Bailey at the time, was asked

to get over this difficulty by preferring a voluntary bill against Rooney, and a bill was preferred against him. If the conviction against Rooney were quashed, he would have to stand his trial on that bill, but we need not go into these matters beyond saying that there were two depositions before the court which were regularly signed and which justified a committal on the receiving charges. Therefore this appeal fails and is dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Solicitor, Metropolitan Police.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 28, 1958

BEER v. DAVIES

Road Traffic—Notice of intended prosecution—Service—Proof of service—Proof that notice was correctly directed, stamped and posted—Notice never received by defendant—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 21.

A notice of intended prosecution for careless driving was addressed by registered post to the defendant on June 20, 1957, ten days after the accident which gave rise to the prosecution. The notice was addressed to the address given by the defendant to the police officer who had investigated the accident. The defendant did not receive the notice because he was away from his home on holiday from June 15 to 22 and between those days there was no one at his home. On June 27 the notice and its envelope were returned to the police by the Post Office. The prosecutor made no enquiries with regard to the defendant's whereabouts, nor did he consult the employers in whose employment he knew that the defendant was.

HELD: that it was not enough to prove that the notice was correctly directed, stamped and posted, but it was open to the defendant to show that the letter containing the notice had never been received; as he could do so, and as the prosecution on the facts of the case could not bring themselves within the proviso to s. 21, there had been no valid service of the notice and no compliance by the prosecution with the requirements of s. 21.

CASE STATED by a metropolitan magistrate.

On July 29, 1957, an information was preferred by James Beer, the appellant, against George Robert Davies, the respondent, that on June 10, 1957, the respondent drove a motor vehicle without due care and attention contrary to s. 12 (1) of the Road Traffic Act, 1930. When the information was heard before the metropolitan magistrate at Bow Street Magistrate's Court, the respondent raised the question whether s. 21 of the Act of 1930 had been complied with.

The respondent, when driving a London Transport omnibus, was involved in a collision with a motor car. A police officer who was near to the scene of the collision took the appropriate particulars from the respondent including his name and address which the respondent correctly gave as 153, Tunnel Avenue, Greenwich, London, S.E.10, without adding any qualification. The respondent was not warned at the time of the collision that he might be prosecuted under the Road Traffic Act, 1930. No summons for an alleged offence under the Act of 1930 was served on the respondent within fourteen days of the collision but on June 20, 1957, viz., ten days after the commission of the alleged offence, a notice of intended prosecution, within the terms of s. 21 of the Act of 1930, was sent by registered post to the respondent to the address which he had

given to the police officer at the time of the collision. On June 27, 1957, the notice and its envelope were returned to the appellant by the Post Office, the envelope being marked "Undelivered for reason stated. No response to 739 [the postman's number]". In fact, the respondent was away from his home on holiday from June 15 to June 22 and, between these dates, there was no one at his home to take in registered post which was delivered there. The appellant made no inquiries as to where the respondent was nor did he consult London Transport Executive, whom he knew to be the respondent's employers. No notice of intended prosecution was served by the appellant on London Transport Executive, who were the registered owners of the omnibus. When it was discovered, after June 27, that the respondent had been away on holiday, a police officer went to the respondent's home, on July 2, viz., more than fourteen days after the commission of the alleged offence, and personally served on him a second notice, explaining to the respondent what had happened to the original notice. London Transport Executive, the respondent's employers, knew that he was away on holiday and would not be returning to work until June 30, but they did not know where he had gone.

It was contended for the respondent that s. 21 of the Road Traffic Act, 1930, had not been complied with in that the second notice was out of time and the first notice was not received by the respondent; accordingly, the respondent should be acquitted of the alleged offence. For the appellant, it was contended that as the first notice was properly sent by registered post within the time specified in s. 21, to the address which the respondent gave, and since the police were unaware that the respondent was going away on holiday, s. 21 had been complied with. The metropolitan magistrate was of opinion that the respondent's contentions were correct and that the failure to comply with s. 21 was not due to any of the matters stated in the proviso to that section; accordingly, he dismissed the information against the respondent. The appellant appealed.

The question for the opinion of the court was whether, on these facts, the metropolitan magistrate came to a correct decision in law.

Wrightson for the appellant.

H. F. Newman for the respondent.

LORD GODDARD, C.J., having stated the facts and referred to the Case Stated, continued: Section 21 of the Road Traffic Act, 1930, provides that a person prosecuted for a driving offence under the Act shall not be convicted

"unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

Before I read the proviso to s. 21 of the Act of 1930, I will say this: The question is whether this notice has been served on the respondent, and it can be served either by serving it on him—that is personal service—or serving it by registered post. Various other cases have been decided in this court, which I need not consider, since the Court of Appeal have subsequently dealt with the question of service—it is true that this was with regard to service of a notice under another Act than the Road Traffic Act, 1930. Service by post is the subject of s. 26 of the Interpretation Act, 1889, which provides:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi* (1), have decided that where a notice is to be served by registered post, though it is prima facie enough to prove that it was correctly directed, stamped and posted, yet if it can be shown that the notice was never delivered, there has not been service and s. 26 of the Interpretation Act, 1889, does not apply. In *R. v. London Quarter Sessions, Ex p. Rossi* (1) the Court of Appeal were not concerned with the Road Traffic Act, 1930. The question was one of an appeal to quarter sessions in a bastardy matter, but the substance of the decision applies equally here because the Court of Appeal were considering s. 3 of the Summary Jurisdiction (Appeals) Act, 1933, which provides for the giving of various notices, and says:

"A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

What happened in that case was that the alleged putative father, the man who had been adjudged by the magistrate not to be the putative father, who was the respondent to the mother's appeal, had left the house where he had been living, and a notice was sent to him at the house, which was his last known place of abode, by registered post. He had gone away, and the letter was not taken in. The Court of Appeal held that no notice had been given to him and reversed the decision of this court, which had held that there had been service of the notice. I am bound to say that one of the things that caused this court to decide that there had been service was that we thought that the man was deliberately evading service, and had taken himself off so that the unfortunate woman could not know where he was. She knew where he ordinarily lived, and she sent the notice there, but it was proved that he had gone away. We thought that he was evading service, and we thought the section had been complied with, but the Court of Appeal said that that was wrong. It is true that DENNING, L.J., in the course of his judgment said:

"Evading service would be a ground for ordering personal service or substituted service, but not for dispensing with service altogether."

With great respect to the learned lord justice, while I know that there are many rules of the Supreme Court which deal with the substituted service of writs or other proceedings, I do not know of any rule under the Magistrates' Courts Act, 1952, or anywhere else, which provides for substituted service of notices which have to be given under the Acts that apply in those courts. It may be, in view of the expression of opinion of DENNING, L.J., that one may go to a court and ask for leave to serve a notice by substituted service. How that can be done in the case of an appeal to quarter sessions I have no knowledge. Is one to apply to the magistrates for leave to serve by substituted service, or is one to apply to quarter sessions, which is the court which has to try the case, because quarter sessions probably will not be able to sit in time for one to apply as they

(1) 120 J.P. 239; [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

only sit so many times a year? I confess that I do not understand how substituted service can be effected, but at any rate there is the decision of the Court of Appeal that service of a notice sent by registered post but not delivered is not good service. I do not see, therefore, that we can possibly hold otherwise in this case without disregarding that decision, though, technically, it may not be binding because it is a criminal cause or matter.

After full argument, it seems to me that we are bound to decide that there has not been service in this case. Then comes the question whether the proviso to s. 21 of the Road Traffic Act, 1930, is brought into play. The proviso says:

"Provided that—(i) Failure to comply with [the requirement in s. 21 that there shall be no conviction unless *inter alia* within fourteen days of the commission of the offence a notice of intended prosecution has been served either on the accused or the registered owner of the vehicle] shall not be a bar to the conviction of the accused in any case where the court is satisfied that—(1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure."

Therefore, before the failure to serve can be excused, the court has to be satisfied that neither the name nor the address of the accused or his employer could be ascertained, because s. 21 of the Act of 1930 provided that the notice could be sent by registered post to the person registered as the owner of the vehicle as well as to the actual driver at the time of the commission of the offence; so it seems to me that it is impossible to bring that part of the proviso into play because the police certainly knew the registered owner of the vehicle, that is to say, the London Transport Executive. Of course, I quite understand their position. Their position was that naturally they served the notice on the respondent whose name and address they had got. It was because the Post Office took some time to return the notice to the police that they had not time then to serve the registered owner, but that is a matter of which the respondent can take advantage. We cannot rewrite the section. The whole point is this, that it is said that the accused by his own conduct contributed to the failure because he had given an address and had not said to the police "I am going to be away on a certain day". Even if he knew that he was going to be away on the day, he at any rate would not know that he was going to be prosecuted. The very object of this notice is to tell him that he is going to be prosecuted. Still less would he know when the notice was going to be served on him. I think that the words "the accused by his own conduct contributed to the failure" mean that the accused had done something which prevented the police from serving him, such as giving a false address.

For these reasons I think that the magistrate came to a correct decision and the appeal fails.

HILBERY, J.: I am of the same opinion. Section 21 of the Road Traffic Act, 1930, is a section which provides certain restrictions on prosecutions under preceding sections, and under the preceding sections it is the duty of the driver to give his name and address. [His LORDSHIP then read s. 21, and continued:] The accident in this case which led to an attempt to serve a notice of an intended prosecution occurred on June 10, 1957. On June 20 a notice purporting to be a notice pursuant to s. 21 of the Act of 1930 was sent to the address of the respondent which he had given to the police at the time when particulars were taken about the accident. He happened to be away on his

holiday, and there was nobody to take in the registered letter, and the postman returned it. Unfortunately the Post Office delayed until June 27, in sending it back to the police as a letter which they had been unable to deliver and, of course, it was then too late for the police to send the notice to the owner of the respondent's vehicle, because fourteen days had gone by. The vehicle being driven was a London passenger omnibus, and the London Transport Executive was the owner.

For the reasons given by my Lord, I am of opinion that we cannot hold that in this case there was a sufficient giving of the notice merely by sending the notice by registered post to the defendant at the address which was his address. We are clearly precluded, it seems to me, by the decision of the Court of Appeal in *R. v. London Quarter Sessions, Ex p. Rossi* (1). I refer particularly to the judgment of MORRIS, L.J., where I think the matter as to which we are precluded is made perfectly clear. After quoting the whole of s. 26 of the Interpretation Act, 1889, which I need not read, he refers to the Summary Jurisdiction (Appeals) Act, 1933, and says:

"The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing. It was, therefore, entirely proper to send a notice to Mr. Rossi by registered post. Applying the provisions of the Interpretation Act, 1889, s. 26, since no contrary intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained the document. Then by the concluding words of s. 26, the sending of the notice was deemed, unless the contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. Here, however, the contrary was proved. It was proved not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all."

For that reason the learned lord justice is saying that there was no compliance with the requirements of the Summary Jurisdiction (Appeals) Act, 1933, that a notice required to be given by s. 3 (1) of the Act might be sent by post in a registered letter addressed to him at his last or usual place of abode. In those circumstances, it seems to me quite plain that we, too, are bound now to give that interpretation to these words in s. 21 of the Act of 1930.

Counsel for the appellant then falls back on the proviso to s. 21, but the proviso in my view on its plain language is a proviso which can only be used where there has been a failure to comply with the requirements of s. 21 because

"neither the name and address of the accused nor the name and address of the registered owner of the vehicle, could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent . . ."

Those words relate to the provision in s. 21 that such a notice may be given to the person who has been driving the car or to the owner of the car and, those alternatives being open, in order to obtain the benefit of the proviso the police must show that neither of those alternatives was open to them by the exercise

(1) 120 J.P. 239; [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

of reasonable diligence. Here that cannot be shown because there was no difficulty about serving the notice on the owner by the exercise of less than diligence, since the vehicle was a public omnibus owned by the London Transport Executive.

Finally, counsel for the appellant says that he relies on the second part of the proviso, namely, that the accused by his own conduct contributed to the failure to serve the notice, but here all that is shown is that the driver of the omnibus, the respondent, having given his correct address in the ordinary course of his employment apparently went away on his annual holiday. He was not to know that the police would be serving any such notice as is required by s. 21, because no warning had been given to him that there might be a prosecution. He was not in any sense taking any action to avoid service, and, without stating anything which would be regarded hereafter as binding on the construction of those words in the second part of the proviso, it is enough to say that in my view at any rate, what he did here did not amount to conduct which contributed to the failure of the police to serve on him the notice under s. 21 which they wished to serve.

For these reasons I agree with the judgment of my Lord.

DONOVAN, J.: I agree with both judgments which have been delivered.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police; Geoffrey B. Gush & Co.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DONOVAN, JJ.)

April 29, 1958

WILKINSON v. BARRETT

Road Traffic—Motor vehicle—Construction and use—Trailer—"Heavy duty car ambulance"—Failure to provide with mudguards and suitable springs—Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955, No. 482), regs. 9, 58.

A garage proprietor was instructed to tow away a damaged car from the scene of the accident. He took with him a towing implement known as a "heavy duty car ambulance" or "mobile car jack", which consisted of a long tow bar with two wheels on a short axle at right angles to the tow bar. He was convicted on informations alleging that he was using a trailer (a) in contravention of reg. 58 of the Motor Vehicles (Construction and Use) Regulations, 1955, in that the trailer was not provided with mudguards, and (b) in contravention of reg. 9 in that it was not equipped with sufficient and suitable springs between each wheel and the frame of the trailer.

HELD, the implement in question was a trailer and contravened the regulations, and, therefore, he was rightly convicted.

CASE STATED by the appeal committee of Dorset quarter sessions.

An information was preferred by the respondent Barrett, a police officer, at Blandford magistrates' court charging the appellant, Harry George Shaw Wilkinson, garage proprietor, with using a trailer which was not provided with mudguards, contrary to reg. 58 of the Motor Vehicles (Construction and Use) Regulations, 1955. Another information charged the appellant with using the same vehicle when it was not equipped with sufficient and suitable springs between each wheel and the frame of the trailer, contrary to reg. 9 of the regulations. The justices convicted the appellant on both informations and

fined him £2 on each. The appellant appealed to quarter sessions, who dismissed the appeals against conviction, but reduced the fine in each case to 5s. The appellant now appealed to the Divisional Court in respect of the convictions.

On May 18, 1957, the appellant was instructed to go from Lincoln to Dorset to pick up a damaged car. For that purpose he took a towing implement commonly known as a "heavy duty car ambulance" or "mobile car jack", which consisted of a long tow bar with two wheels on a short axle at right angles to the tow bar and was used for towing broken-down vehicles. The wheels of the broken-down vehicle were lifted on to the jack, which was then towed by another vehicle. The wheels of the jack were fitted with pneumatic tyres, but it did not have springs or mudguards.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of Dorsetshire Quarter Sessions to whom the appellant appealed against two convictions, one for using on a road in Blandford

"a certain two-wheeled trailer which did not comply with reg. 58 of the Motor Vehicles (Construction and Use) Regulations, 1955, in that the wheels of the said trailer were not then provided with wings or other similar fittings to catch, so far as practicable, mud or water thrown up by the rotation of the wheels."

The second conviction was for using on the road

"a certain trailer drawn by a motor vehicle, which trailer did not comply with reg. 9 of the Motor Vehicles (Construction and Use) Regulations, 1955, in that it was not then equipped with suitable and sufficient springs between each wheel and the frame of the trailer."

The evidence showed that the appellant, who is a garage proprietor in the county of Lincoln, has a contrivance which is called a "car ambulance." It consists of a long bar which is attached to an apparatus for lifting the wheels of a broken-down car off the road and allowing it to be towed by another vehicle, the wheels of the towing ambulance being fitted with pneumatic tyres so that they do not damage the road, but not with springs. We are told, though the Case does not say anything about it, that this appliance is used by the police in London for removing vehicles which are blocking the roads, but the Dorset police thought it was necessary to bring these proceedings—I daresay they were right—and there seems to be no answer to the Case. It would, perhaps, have been better if the appellant or his fellows in the motor industry, instead of bringing this appeal, had called the Ministry's attention to this matter and asked whether a regulation could not be framed which would allow what seems to me to be a useful appliance for taking away broken-down motors. However, we have no power to make regulations, and quarter sessions and this court can only decide whether the regulations have been broken. They have been broken, and, therefore, the justices were right in convicting and quarter sessions were imposed, and we can only dismiss this appeal, but it is a matter to which we think the attention of the Ministry might properly be called, and no doubt, if it were, the Ministry would consider whether a useful appliance of this sort should not be allowed to be used.

HILBERY, J.: I agree.

DONOVAN, J.: I agree.

Appeal dismissed.

Solicitors: *Henry Gover & Sons*, for *Anthony T. Clark*, Lincoln; *Sharpe, Pritchard & Co.*, for *C. P. Brutton*, Dorchester.

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHERD, M.R., MORRIS AND ORMEROD, L.J.J.)

May 6, 7, 1958

SAYERS v. HARLOW URBAN DISTRICT COUNCIL

Negligence—Public lavatory—Plaintiff shut in cubicle owing to defective lock—No attendant present—Plaintiff injured while attempting to escape.

The defendants, a local authority, owned and operated a public lavatory. The plaintiff, who, with her husband, had arranged to catch a bus which was due at a bus stop nearby twenty minutes later, entered the public lavatory and paid for admission to a cubicle by putting a penny in the slot provided for the purpose. Having closed the door of the cubicle she found that she was unable to re-open it as the inside handle was missing. There was no warning notice outside the cubicle, and there was no attendant at the lavatory. Having tried unsuccessfully to operate the lock, the plaintiff tried, also unsuccessfully, to put her hand through a window to attract attention. She then banged on the door and shouted, but no one came. After some ten or fifteen minutes, she decided to see whether it would be possible for her to climb out through the space between the top of the door and the ceiling, and, in order to do so, she stood with her left foot on the seat of the lavatory and rested her right foot on the toilet roll and fixture, holding the pipe from the lavatory cistern with one hand and resting the other hand on the top of the door. Finding that it would be impossible to get out over the door, she proceeded to come down, and, as she was doing so, the toilet roll rotated, owing to her weight on it, and upset her balance, so that she fell to the ground and was injured. In an action by the plaintiff for damages against the defendants, the defendants were found to have been negligent, but the action was dismissed on the ground that the plaintiff chose to embark on a dangerous manoeuvre and must bear the consequences of her action. On appeal,

HELD: in all the circumstances of the case the plaintiff had not acted unreasonably, and, therefore, the damage was not too remote; she could, however, not be completely absolved from some measure of fault and ought to recover only three-fourths of the damage which would have to be assessed.

APPEAL from Bishop's Stortford County Court.

The plaintiff, Mrs. Eileen Sayers, appealed from so much of a judgment of His Honour JUDGE LAWSON CAMPBELL, given at Bishop's Stortford County Court on Nov. 25, 1957, as adjudged that the plaintiff's claim for damages for personal injuries failed and that judgment on the claim be entered for the defendants, Harlow Urban District Council.

On Jan. 14, 1956, the plaintiff, having paid for admission, entered a cubicle in a public lavatory provided and maintained by the defendants. Finding that there was no handle on the inside of the door and no means of opening the cubicle, the plaintiff tried for some ten to fifteen minutes to attract attention and then tried to see if there was some way of climbing out of the cubicle. With this object, she placed one foot on the seat of the water closet and balanced the other on the toilet roll and its fixture. Realising that it would be impossible to climb out, she started to come down, slipped and injured herself. In her action against the defendants, the plaintiff alleged (i) that there was an implied warranty on the part of the defendants in regard to the safety of the cubicle, and that the defendants were in breach of the warranty; and (ii) negligence on the part of the defendants, their servants or agents in failing to inspect or repair the handle of the door of the cubicle or to warn members of the public of the condition of the cubicle. The county court judge found that there was a breach of duty on the part of the defendants, but that the plaintiff was in no danger on that account, and he held that, as the plaintiff chose to embark on a dangerous manoeuvre, she must bear the consequences of her action.

J. J. Davis for the plaintiff.

Elton for the defendants.

LORD EVERSHERD, M.R.: In this appeal a difficult question has arisen as to the liability of the defendants to the plaintiff, in the circumstances which I shall relate. On the morning of Jan. 14, 1956, the plaintiff, with her husband, left home with a view to going to Olympia in London. They intended to travel to London on an omnibus, and they were on their way to the bus stop. The plaintiff then was minded to visit the public lavatory owned and operated by the defendants. She went to the lavatory, her husband going on to the bus stop. She went to the furthest cubicle, and on entering the lavatory put a penny in the slot provided for the purpose, opened the door, went in, and found that the door had shut and left her with no means from the inside of re-opening it. It then appears that she spent some time in trying to attract attention orally and visually from the window in the lavatory, and, that having failed, proceeded to try to see if she could escape via the door, or make her presence known from or over the door. She stood with her left foot on the seat of the lavatory. With her left hand she seized the pipe from the lavatory cistern. Her right hand she put on top of the door, and her right foot rested on the toilet roll and the small fixture in which it was inserted. She had got so far in the belief that she would be able by a feat not too acrobatic to get out over the door, which was seven feet high and left a space of about two feet four inches between the top of the door and the ceiling. Having arrived in the posture which I have stated, she concluded, quite rightly, that the feat which she had envisaged was not within the bounds of her performance, and she then proceeded to start to regain the ground. It was at that stage, or very shortly afterwards, that the misfortune occurred; for she allowed some degree of her weight to be on the toilet roll, and her balance to depend on it. The toilet roll, true to its mechanical requirement, rotated, and that unfortunately disturbed her equilibrium. She fell and sustained injury. The injury was not trivial, though I understand that it was not serious. We have not gone into the quantum of damages.

In those circumstances, the plaintiff claimed that the damage which she had suffered was due to the fault of the defendants, that fault being in the form of breach of the duty of care owed to her, whether or not arising under the implied contract when she made use of the lavatory. Nothing turns on the foundation of liability, nor, indeed, on the finding of the learned judge that the defendants were negligent; for there has been no appeal on the part of the defendants from that finding. The issue before us has been confined to the second part of the judge's conclusion, namely, that the damage suffered was in the circumstances too remote from the negligent act or omission of the defendants and fell outside the famous formula of being the natural and probable consequence of the wrongful act. In those circumstances, he dismissed the plaintiff's claim. The questions, therefore, which have been present on appeal can be stated thus: (i) Was the damage suffered by the plaintiff too remote? Put otherwise, was her activity, which I have briefly described, and from which the damage ensued, not a natural and probable consequence of the negligent act of the defendants within the famous formula in *Hadley v. Baxendale* (1)? (ii) If the damage was not too remote, then was the plaintiff herself guilty of some degree of fault, of what is called contributory negligence, so as to reduce the total liability of the defendants to her?

I return now for a more close consideration of the exact facts which I have so far briefly described as they are stated in the evidence, and as the learned judge found them. I must observe (and it is not unimportant) that there was here no claim or suggestion on the part of the plaintiff that she was acting in

(1) (1854), 9 Exch. 341.

panic. In other words, this is not a case in which it was said that what the plaintiff did, if it was mistaken in any degree, was something done in what is called "the agony of the moment". [HIS LORDSHIP reviewed the evidence, and continued:] From the evidence it seems clearly to follow that the plaintiff, acting quite calmly and on reflection, thought that she would, or at least might, be able to get out of this cubicle by climbing over the top of the door; that she achieved the first stage of that operation; and then, quite sensibly, and without trying anything hazardous or impossible, concluded that after all she was wrong, and that she could not do it. She thereupon proceeded to lower herself in order to regain the ground. It seems to me, therefore, that, so far, she must be taken as having acted entirely rationally. I cannot, for my part, think that she could be condemned for having failed to see from the very start that the whole thing was impossible; and, secondly, it appears to me to be quite clear that there was no damage suffered by her from anything that she did in what I call the first stage of the operation. In other words, the damage did not flow from attempting to do something which she could not do, and had no business to try to do. The damage was suffered by her after she had realised that the attempt could not be carried out, and while she was trying to return to the ground.

The findings of the learned judge on this matter are expressed as follows. After stating his conclusion about the negligence, he said:

"There is, however, a second question. The plaintiff had left her husband ten minutes before, and he knew where she was going and that the bus was due to leave in twenty minutes. She had been in the lavatory for ten minutes without avail before she attempted to climb out, and the time for the bus was approaching. What would have been a reasonable thing for her to do? To climb out was a very hazardous undertaking. Counsel for the plaintiff says that it was perfectly reasonable for a lady of thirty-six with skirts and, no doubt, high heels, to do it . . . The consequences might have been very serious indeed. I think what she was undertaking was an exceedingly perilous manoeuvre. It does not follow that a person put in difficulty may not undertake a risk . . ."

Then there was a reference to the stage coach case, *Jones v. Boyce* (1), and the judge went on to say:

"I must apply a balance between risk taken by the plaintiff against the consequences of the defendants' breach of duty. The plaintiff was not in any sort of danger, nor, indeed, in any real discomfort. It was not as though it were late at night. She knew, or ought to have known, that at 8.32 a.m. her husband must come and find out what had happened to her. The only consequence would have been the wrath of her husband, and an hour's delay. She took an extremely dangerous course, and I have to balance the inconvenience against the danger. I feel that this case is similar to *Adams v. Lancashire & Yorkshire Ry. Co.* (2)."

With all respect to the learned judge, I have formed a different view. I agree with the learned judge when he stated that it was the duty of the court to balance the risk taken against the consequences of the breach of duty: in other words, as was put in the argument, to weigh the degree of inconvenience to which the plaintiff had been subjected with the risks that she was taking in order to try to do something about it. Where I part company with the judge is, first, that, as I have read and understood the evidence, I do not think it true to say that the damage was suffered by the plaintiff in undertaking something very hazardous

(1) (1816), 1 Stark. 493.

(2) (1869), L.R. 4 C.P. 739.

which, as a rational human being, she had no business to undertake. I further venture to think that the case is not, in truth, on all fours with or covered by *Adams v. Lancashire & Yorkshire Ry. Co.* (1).

The argument of the defendants, of course, is to the contrary effect. Counsel for the defendants, basing himself on *Adams v. Lancashire & Yorkshire Ry. Co.* (1), contended that the most the plaintiff was suffering was a minor inconvenience, and that she was not entitled to take a grave risk in an attempt to put an end to the inconvenience. In my view, the adjectives are inappropriate. I cannot think that the inconvenience can be called minor in the sense in which the word is used in such a context; nor do I think that the risk was grave. I think that here we have to apply the ordinary common-sense tests. A woman goes to a public lavatory and finds that she is immured in it. She finds, after ten or fifteen minutes, that the obvious and proper means of attracting attention have been entirely without avail; shouting and waving through the window have produced no result at all. It is an extremely disagreeable situation in which to find oneself; and it seems to me to be asking too much of the so-called reasonable man or woman to suppose that he or she would just remain inactive until her husband, or someone else, chose to come and look for her and find her. It is to be observed here that the attendant employed by the defendants was not, in fact, there at the time (and was not called as a witness). I think that, applying the ordinary tests of reasonableness, it was not an unreasonable thing to do, nor was it indulging in grave risk for the plaintiff to see whether her first impression was right, namely, that by standing on the seat she might be able to hoist herself out over the door. It is also to be observed that she quite properly and reasonably concluded, when she had got on the seat, that the manoeuvre was beyond her capacity. Therefore I am unable to accept the view expressed by the learned judge, with all respect to him, that what she was doing was attempting a very hazardous undertaking in climbing out.

Secondly, it was put by counsel for the defendants (and put, if I may say so, with great force) in this way. He said, in effect: "I quite agree that this is a difficult matter. A judge of fact or a court might well have held that what the plaintiff did was a natural and probable consequence of her being immured in the lavatory, and that, therefore, the damage flowed, or partly flowed, from the negligent act; but, after all, this was a finding by the learned judge who saw all the witnesses in the case. He is most certainly a careful and experienced judge, and this court ought not to interfere with his conclusion". With that I should, in the ordinary way, be most sympathetic, and, indeed, I must say I am not unsympathetic. But I have read the passage in his judgment, including particularly that in which the judge came to the conclusion that the case was similar to, and therefore covered by, the decision in *Adams v. Lancashire & Yorkshire Ry. Co.* (1). I turn, therefore, for a moment to that case. The plaintiff was travelling as a passenger in a train operated by the Lancashire and Yorkshire Railway Company in the month of July, in the year 1868. The door of the carriage was faulty and would not keep shut, and, as the train proceeded on its journey, it flew open not once but three or four times. The plaintiff, having three times shut the door without any permanent result, made a fourth attempt, in the course of which, from the facts found, it appears that he allowed the whole of his weight to rest against the door. The result was that, the plaintiff being no more successful in making the door keep shut than he had been on the three previous occasions, and the door inevitably opening, he fell out and was injured, as well he might be since the train was moving. I have emphasised the

(1) (1869), L.R. 4 C.P. 739.

date and the time, first, because it was pointed out that the plaintiff was found not to have suffered any inconvenience at all. It might, no doubt, be irritating to see a door open, but it was summer, and it was not suggested that he was cold, or subjected to any draughts; and, what is more, the train would, in the course of about three minutes, stop at a station. It follows, therefore, looking at the matter from the point of view of inconvenience, that the plaintiff's inconvenience or annoyance at seeing the door open is not really comparable with what any ordinary person would feel at finding himself or herself incarcerated in a lavatory. Secondly, it is to be noted that this was a moving train; and it must, I should have thought, be quite plain to any intelligence that, if one puts oneself in a position which involves one in the risk of falling out of a moving train, one is doing something hazardous in the extreme. There is, finally, the third point, which arises from the date when this case was decided, that is, at a time long before the recent amendment of the law by the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), so that a finding of any degree of contributory negligence would be fatal to the plaintiff's claim, and when, moreover, as a consequence of the rule of law which I have just indicated, there was currently held, or apt to be applied, what is sometimes called the "last opportunity" principle. I mention that because it is, I think, fair to say, as counsel for the plaintiff pointed out, that if one examines the judgments of these three learned judges of the Court of Common Pleas, although two may well have decided the case on the ground that the damage was too remote from the negligent act in having an improperly working door, the third of them, BRETT, J., who in fact had tried the case before the jury, based his opinion on the contributory negligence point. I do not propose to read all the judgments, but, as the learned county court judge attached importance to the case, I should perhaps make two references, one to the judgment of MONTAGUE SMITH, J., and the other to that of BRETT, J. MONTAGUE SMITH, J., said:

"At the time the plaintiff got up to shut the door he was in a position of entire safety, and it is not even stated in the evidence that he was suffering inconvenience from draughts or otherwise. Such being the case, he voluntarily undertook to shut the door, and, in doing so, used both hands, and did not hold on with either of them. He was obviously doing that which was dangerous, and the ground upon which the plaintiff puts his case is, that it was necessary to do so to obviate the results of the defendants' negligence. I quite agree that, if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still, and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and, to avoid that, he voluntarily runs into danger, and injury ensues, that cannot be said to be the result of the company's negligence. It is hardly necessary to say, that though I use the words 'danger' and 'inconvenience', yet, if the inconvenience is very great and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger."

If I leave out the qualifying "very", I think that the statement of MONTAGUE SMITH, J., would be no less true:

"It is hardly necessary to say, that though I use the words 'danger' and 'inconvenience', yet, if the inconvenience is . . . great and the danger run in avoiding it . . . slight, it may not be unreasonable to incur that danger."

Before further comment, I read this passage from the judgment of BRETT, J., because it is one which has later received much commendation:

"I think, if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience."

I observe that the words "and executed without carelessness" would not now be necessary, because, if it were executed with some carelessness today, it would result not in a total failure of the plaintiff's claim, but might lead to an apportionment of the damage. At the end of his judgment, BRETT, J., said:

"... under these circumstances, I think the putting himself into peril was contributory negligence, and that the case therefore ought not to have been left to the jury."

I now return to the first citation from the judgment of BRETT, J., and the passage which I read from the judgment of MONTAGUE SMITH, J. With all respect to the learned county court judge, it does not seem to me that it can be said that those passages, in the light of the facts in the present case, determine the case against the plaintiff as they did in *Adams v. Lancashire & Yorkshire Ry. Co.* (1). As I have already said, the inconvenience to the plaintiff was, to my mind, appreciable, if not substantial, and so would be, I think, to any ordinary person. I think that she was not, in truth, engaged in a hazardous enterprise. She was doing something, as I venture to think, not at all unreasonable, and she did it up to the point where, quite properly, she reached the conclusion that the possibilities which the gap above the door of itself presented were not available to her. For those reasons, therefore, I think that the conclusion of the judge wholly adverse to the plaintiff ought not to stand.

That is, however, still not the end of the matter. In the passage which I read from the judgment of BRETT, J., there occur the words "executed without carelessness". Now what is the situation here? Counsel for the defendants did not really emphasise this aspect of the case much, although, very properly and naturally, he claimed that, if the activity of the plaintiff ought to be treated as the natural and probable consequence of her incarceration, still to some degree at least, to use the judge's own phrase, she was the author of her own calamity. I have given very careful thought to this aspect of the matter; and I think, in justice to the defendants, and in deference to the view which the learned judge took of the plaintiff, it would not be right to say that the plaintiff was herself free from blame. I think that, in getting to the position where she could see, and did see, that escape via the top of the door was impossible, she acted without carelessness; but it is true to say—though, no doubt, it is being wise after the event—that, in getting back to terra firma again, she should have appreciated that she could not and ought not to allow her balance to depend on anything so unstable as a toilet roll and a fixture of a somewhat slender kind. It was not a grave error, and I think that the consequences were unduly unfortunate in the circumstances; but it is impossible to acquit the plaintiff altogether from some carelessness. In these matters the apportionment must be largely a question of, I will not say hazard, but at any rate of doing the best one can in fractions; and applying myself to it in that way, and not desiring to do more than indicate that the plaintiff was, as I think, in some degree careless and in some degree, therefore, blameworthy, I would apportion the matter as to three-fourths liability to the defendants, and one-fourth to her. In other words, I think that the plaintiff ought to recover from the defendants seventy-five per cent., or three-fourths, of whatever be the appropriate measure of damage suffered.

(1) (1869), L.R. 4 C.P. 739.

MORRIS, L.J.: It was held by the learned judge in this case that there was a breach of duty on the part of the defendants. That finding is not, and I think could not be, challenged. The defendants provided conveniences for the use of the public. The plaintiff paid for admission to a cubicle. Its lock was defective in that there was no handle inside. From the outside there was no indication of such state of affairs. The result was that, after the plaintiff had entered the cubicle, she was a prisoner therein. The cubicle was one which women members of the public were invited to use. It ought not to have been in use. There was no warning, and there was no attendant at the lavatory. The defendants were clearly responsible for the circumstance that the plaintiff was permitted to enter a cubicle from which there was no ordinary method of egress. The defendants should be responsible for the direct and natural consequence of their breach of duty. The most natural and reasonable action on the part of someone who finds herself undesignedly confined is to seek the means of escape. Those who are responsible for the unjustifiable detention can hardly, either with good grace or with sound reason, be entitled to be astute in offering criticism of the actions of the unfortunate victim.

In *Robson v. North Eastern Ry. Co.* (1), FIELD, J., in giving the judgment of the court, used these words:

"... it has been long established that, if a person by a negligent breach of duty expose the person towards whom the duty is contracted to obvious peril, the act of the latter in endeavouring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrongdoer; *Jones v. Boyce* (2); and this doctrine has, we think, been rightly extended in more recent times to a 'grave inconvenience', when the danger to which the passenger is exposed is not in itself obvious. In *Adams v. Lancashire & Yorkshire Ry. Co.* (3), the doctrine was accurately expressed by BRETT, J., who says: 'If the inconvenience is so great that it is reasonable to get rid of it by an act, not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience'."

At the same time, however, even those in breach of duty are not to be held liable in respect of what cannot fairly and reasonably be regarded as a consequence of the breach. *Jones v. Boyce* (2) was the case in which an action was brought against a coach proprietor for so negligently conducting the coach that the plaintiff, who was an outside passenger, was obliged to jump off the coach as a result of which his leg was broken. What had happened was that a coupling rein broke, and, one of the leading horses being ungovernable, while the coach was on a descent, the coachman found it necessary to draw the coach to the side of the road where it came in contact with some piles, one of which it broke: afterwards the wheel was stopped by a post. The coupling rein was defective, and the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road. In directing the jury in that case, LORD ELLENBOROUGH told them that there were two questions for their consideration: (i) whether the proprietor of the coach was guilty of any default in omitting to provide the safe and proper means of conveyance; and (ii) if they thought that he was, whether the default was conducive to the injury which the plaintiff sustained. LORD ELLENBOROUGH went on to direct the jury that it was sufficient if the

(1) (1875), L.R. 10 Q.B. 271; *affd.* C.A. (1876), 41 J.P. 294; 2 Q.B.D. 85.

(2) (1816), 1 Stark. 493.

(3) (1869), L.R. 4 C.P. 739.

plaintiff was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril. LORD ELLENBOROUGH went on to say, on the other hand, that, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained was to be attributed to rashness and imprudence, then he was not entitled to recover.

The conduct being examined has to be tested and considered in the light of all the circumstances. The question in the present case is whether the injury sustained by the plaintiff resulted either entirely or partly from the defendants' breach of duty. The defendants assert that, as the plaintiff was in no danger and was in no serious inconvenience, she acted unreasonably in doing what she did, so that she and she alone was the authoress of the injury that befell her.

I do not think that the plaintiff should be adjudged in all the circumstances to have acted unreasonably or rashly or stupidly. As to nearly everything that she did, in my judgment she acted carefully and prudently. Indeed, she showed a very considerable measure of self-control. My Lord has fully recited the facts, and there is no need for me to refer to them again. The learned judge has found them carefully, and the only advantage that he has over us is that he actually saw the plaintiff herself. Subject to that advantage which in the present is comparatively slight, we are in as good a position as the judge to determine this matter. What did the plaintiff do? First, she did her best to operate the lock. She tried with her finger to see whether there was any way of making it work. There was not. She then tried to get her hand through the window. She was unable to do that. She then banged on the door. Nobody came. She shouted. There was no response. Ten or fifteen minutes went by. The situation could not have been an agreeable one. What did she then do? It appears to me on the evidence that what she did was to explore the possibility of climbing over the door. That I cannot think was unwise or imprudent, or rash or stupid. I have therefore come to the same conclusion as that expressed by my Lord. Like my Lord, I feel that the plaintiff cannot entirely be absolved from some measure of fault—the fault described by my Lord—and I am in agreement that that measure should be marked by depriving her of one quarter of that to which she would otherwise be entitled. I consider that the appeal should be allowed to the extent that my Lord has indicated.

ORMEROD, L.J.: I agree that this appeal should be allowed. The case depends very largely on the view to be taken and the inferences to be drawn from the evidence of the plaintiff herself, evidence which the learned judge quite clearly has accepted as being an accurate recollection of the facts as they took place. The learned judge, however, appears to have based his judgment on the finding that at the time of the accident the plaintiff was actually attempting to climb over the door of the cubicle, and that this was, to use his words, "an exceedingly perilous manoeuvre", the risks of which were not warranted by the situation in which the plaintiff found herself. For my part, I am not satisfied that that view is in accordance with the evidence. The situation, as I see it, appears to be, as has been stated by LORD EVERSHERD, M.R., and MORRIS, L.J., that the plaintiff, finding that her efforts to draw attention to her plight were unavailing, decided to try to climb over the door, or at least to explore the possibility of escape by that means. She said in her evidence that she was confident that she could do it, and that, no doubt, is the opinion which she formed when she was considering, apparently quite collectedly, the situation in which she found herself. She then stood on the seat of the lavatory, holding the pipe running from the cistern in her left hand, and the top of the door with

her right hand. Up to that time I do not think anyone could say that she had done anything unreasonable or run any unusual or improper risk. Indeed, counsel for the defendants agreed that, had she slipped and been injured in getting down from that position, he would have been unable to resist a claim for damages. However, the plaintiff went a little further than that. She put her right foot on the toilet roll, the position of which was some three feet from the ground on the wall on her right hand side. Having put her foot on the toilet roll, she kept her left foot on the lavatory seat, still grasping the water pipe and the top of the door with her hands in the way described. She appears to have put her foot on the toilet roll with the object of exploring the possibility of getting enough leverage, as she described it, to enable her to pull herself up to the top of the door; and, as might be expected, having got into that position, she realised that she would not have enough leverage, and decided to give up the attempt. It was in trying to get down from that position that she had the misfortune to slip and sustain the injuries.

Apart from the question of contributory negligence, it does not appear to me that at that stage the plaintiff had taken any risk which was in any way disproportionate to the necessities of her situation, or which could have been regarded as unreasonable in the circumstances in which she found herself. She was locked in the lavatory. She had been unable to attract attention, and she therefore investigated the possibility of climbing up as she described, but decided on such investigation that she was unable to do it. Had she decided to continue with her attempt to get out by using the toilet roll as a foothold, she would, in my judgment, have been taking risks not justified by the circumstances; but she gave up the attempt before reaching that stage; and in these circumstances the plaintiff, in my judgment, was behaving in a way which was reasonable and, indeed, which was foreseeable having regard to the defendants' breach of duty. I agree, therefore, that she is entitled to succeed. I agree, however, with my brethren that it is impossible in the circumstances to acquit the plaintiff of some carelessness in putting her right foot, as she did, on the toilet roll, and that she should bear one quarter of the blame.

Appeal allowed. Case remitted for assessment of damages.

Solicitors: *Bailey, Breeze & Wyles; Van Sommer, Chillcott, Kitcat & Clark, for Trotter, Chapman & Whisker, Epping.*

F.G.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CASSELS AND DIPLOCK, JJ.)

May 8, 1958

KRUHLAK v. KRUHLAK

Bastardy—Legitimation of child by subsequent marriage of parties—Child born two hours before mother's former marriage dissolved—Bastardy Laws Amendment Act, 1872 (35 and 36 Vict. c. 65), s. 3—Legitimacy Act, 1926 (16 and 17 Geo. 5, c. 60), s. 1 (1).

At 7.30 a.m. on Dec. 2, 1953, a woman, who was then married, but was living apart from her husband, gave birth to a child of which the respondent was the father. The woman's husband had obtained a decree nisi of divorce against her, and this was made absolute at 10 a.m. on the same day.

On Dec. 19, 1953, the woman married the respondent, and on Mar. 26, 1957, she obtained a separation order against him on the ground of persistent cruelty, the order containing a non-cohabitation clause. On Apr. 5, 1957, the woman preferred a complaint against the respondent asking for an affiliation order in respect of the child, and the respondent admitted paternity. The justices held that it was not open to them to hold that the woman was a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1873, quoad the respondent and dismissed the complaint on that ground. The Divisional Court held that the woman could be a "single woman" quoad the respondent, reversed the justices' order, and ordered a re-hearing. At the re-hearing the justices were of opinion that the decree absolute became effective from the beginning of the day on which it was pronounced; that the mother was, therefore, unmarried at the time of the birth of the child; and that by s. 1 of the Legitimacy Act, 1926, the child became legitimated by the subsequent marriage of the parties. They, accordingly, dismissed the complaint on the ground that the child was not a bastard child, and the mother appealed.

HELD: that the justices had correctly applied the rule that where a judicial act, such as the granting of a decree absolute, takes place, it dates from the earliest time of the day on which it occurs, and had, accordingly, come to a correct decision, and, therefore, the appeal must be dismissed.

CASE STATED by justices for the West Riding of York.

At 7.30 a.m. on Dec. 2, 1953, Mary Kruhlak, the mother, who was then married to but living apart from her former husband, who had obtained a decree nisi of divorce against her, gave birth to a female child of which the respondent to this application and appeal was the father. The father was then free to marry the mother. At 10 a.m. on the same day the decree nisi was made absolute in favour of the former husband. The mother married the father on Dec. 19, 1953, and on Sept. 22, 1955, a male child was born to the parties. On Mar. 26, 1957, the mother obtained a separation order against the father on the ground of persistent cruelty. This order contained a non-cohabitation clause and provided for the payment of £3 per week maintenance for the mother and £1 10s. per week for the male child. On the court intimating that the female child was a bastard, in respect of whom no maintenance order could be made on that application, the mother did not pursue her application in respect of the female child. On Apr. 5, 1957, the mother preferred this complaint against the father alleging that she was a single woman and that the female child was a bastard child of which he was the father, and asking for an affiliation order. The father admitted paternity, but on May 22, 1957, the justices dismissed the complaint on the ground that it was not open to them to hold that the mother was a single woman quoad the father, to whom she was married. On an appeal by the mother by way of Case Stated the Queen's Bench Divisional Court, on Dec. 19, 1957, held (122 J.P. 140; [1958] 1 All E.R. 154) that the mother could be a single woman quoad the father, reversed the justices' order of May 22, 1957, and

ordered a re-hearing. At this re-hearing, on Feb. 5, 1958, the justices held that the female child had been rendered legitimate by the Legitimacy Act, 1926, s. 1, and was not a bastard child within the meaning of the Bastardy Laws Amendment Act, 1872, and they accordingly dismissed the complaint. The mother appealed by way of Case Stated.

Ranking for the mother.

Deby for the father was not called on to argue.

DIPLOCK, J.: The applicant, the mother, gave birth to a girl named Joan on Dec. 2, 1953, at 7.30 a.m. On the same day a decree absolute was made in favour of the mother's former husband from whom she had been living separate. The father of the child was the respondent to the summons, and they were married on Dec. 19, 1953; that is to say, seventeen days after the birth of the child.

In the present proceedings the mother took out a summons under the Bastardy Laws Amendment Act, 1872, s. 3 as amended, against the father. The magistrates dismissed that summons on the ground that the child in respect of whom the application was made was a legitimate child. They relied on the rule that where a judicial act takes place, such as the granting of a decree absolute, it dates from the earliest time of the day on which it is made; therefore, the mother and her former husband were divorced before the birth of the child at 7.30 on that day. The child is accordingly a legitimate child of the marriage of Dec. 19, 1953, by virtue of s. 1 of the Legitimacy Act, 1926. This appeal is therefore dismissed.

LORD GODDARD, C.J.: I agree. Having separated from the father of the child and the child being legitimated, as **DIPLOCK, J.**, has just said, the mother can now go back to the magistrates and ask for an increase in the amount that she has been awarded under the separation order.

CASSELS, J.: I agree.

Appeal dismissed.

Solicitors: *Long & Gardiner*, for *A. Maurice Smith*, Castleford; *Collyer-Bristow & Co.*, for *Alf. Masser & Co.*, Leeds.

T.R.F.B.

COURT OF APPEAL

(LORD EVERSHERD, M.R., MORRIS AND ORMEROD, L.JJ.)

May 21, 22, 1958

HAVANT AND WATERLOO URBAN DISTRICT COUNCIL v. NORUM

Housing—House of local authority—Differential rent scheme—Rents based on annual gross income of tenant—Excess rebate granted—Recovery of ex post facto rent.

The local authority owned and managed a housing estate consisting of 1,850 tenancies, the rents of which were subsidised at an average of 12s. per week. In 1955 the local authority decided to introduce a differential rent scheme, and for that purpose they gave all their tenants notice to quit on April 5, 1955, and offered them new tenancies at an economic rent if their gross annual income was £620 (or a weekly average of £11 18s. 6d.) or above. These maximum rents could be reduced on application by a tenant by way of rebate up to 12s. per week if his annual gross income was below £620. A leaflet setting out the scheme defined annual gross income and provided in para. 4 regarding the alteration of rents as follows: "Any increase or decrease in the gross income necessitating a re-assessment of rent must be notified immediately by the tenant or his agent calling at this office to complete the appropriate forms, produce such documentary evidence as may be necessary to substantiate, and leave the current rent card for alteration. Alterations in rent will be operative (a) from the first rent collecting period after notification, as above, of any change of financial circumstances requiring a decrease in rent; (b) from the first rent collecting period after a change of financial circumstances arose requiring an increase in rent."

In February, 1955, the tenant was given notice to quit and a new tenancy was offered him at a maximum rent of 34s. 5d. per week (later reduced to 29s. 4d.) subject to rebates according to the scheme. On his application the maximum rebate of 12s. was granted. He paid that rent during the financial year 1955-56. During the summer of 1955 he did a good deal of overtime. In February, 1956, he was asked to make a return of his annual gross income for the year 1955-56. On the figures received the local authority came to the conclusion that as from June 6, 1955, the tenant was only entitled to a rebate of 2s. per week. They, therefore, assessed the rent for the year 1956-57 at 37s. 4d. plus 10s. in order to recoup them for the under-payment of rent for the year 1955-56, thus increasing the rent by £1 per week. The tenant protested against that increase, but, on being told that, if he did not pay it, he would be turned out of his house, he submitted to paying it until he determined his tenancy on October 7, 1957. When the tenant left £10 3s. 2d. was outstanding on account of excess rebates for the year 1955-56. The tenant's rent card showed no amount of arrears of rent. The local authority sued the tenant for that amount as arrears of rent from June 6, 1955, to April 1, 1956.

HELD: (i) the agreement between the local authority and the tenant was to the effect that the tenant should repay by way of increase of rent of 10s. per week a sum equal to the excess rebate for the previous year, and the termination of the tenancy put an end to his obligation; (ii) assuming that para. 4 of the leaflet enabled the local authority to increase the rent ex post facto without the consent of the tenant, that power was never exercised and there was no increase of rent for the year 1955-56, and, therefore, the demand for arrears of rent failed.

APPEAL from Portsmouth County Court by the Havant and Waterloo Urban District Council.

At the beginning of 1955 the defendant, one Arne Norum, was a tenant of a house known as 61, Elizabeth Road, Waterlooville, owned by the local authority to whom he was paying an inclusive weekly rent of £1 10s. 7d. In that year the local authority decided to inaugurate a "differential rents scheme" whereby the benefit of subsidised houses would be enjoyed only by those whose means did not enable them to pay an economic rent. Accordingly, on Feb. 5, 1955, the local authority sent to the tenant a notice to quit the premises on Apr. 4, 1955, and in an accompanying letter written to the tenant by the clerk to the council it was stated:

"The council have recently revised the terms on which they are willing to let council houses. Particulars of the new arrangements are set out in the enclosed leaflet. The information contained in the leaflet, together with the conditions of tenancy which, for the sake of convenience, are already set out on the backs of rent cards, will be made widely known, and all new tenancies will be understood to be granted on this basis without any formal tenancy agreement being entered into.

"In order to bring the new arrangements into being it is necessary to bring to an end existing tenancies and for this reason a notice to quit is enclosed with this letter, but I am authorised to offer you a new tenancy at a net weekly rent of 34s. 5d. from which, however, there may be deducted such amounts by way of rebate as you may from time to time be eligible for under the subsidy adjustment rents scheme set out in the leaflet. To the net rent, calculated in the way just explained, there will be added an appropriate amount for rates.

"If you accept this offer there is no need for you to give up possession of the house, and if you are still in occupation of the house after the notice to quit has become operative, it will be assumed that you have accepted the tenancy on the revised terms and you will be chargeable with rent on the new basis as from Apr. 4, 1955."

In the leaflet it was stated:

"The council have decided to operate, as from Apr. 4, 1955, a subsidy adjustment rent scheme which entails the payment of a rent calculated by reference to the following provisions."

Paragraph 1 then set out in tabular form the relevant weekly rent payable by "tenants in receipt of a gross income during the current financial year amounting to" sums ranging between a yearly salary of £620 and above down to a yearly salary of below £520, and showing that if the tenant's yearly salary was less than £620 he could obtain a rebate varying between 2s. and 12s. per week (depending on the amount of his salary). Paragraph 2 stated:

"Gross income is the combined income of the tenants . . . and includes salary, wage, overtime . . . and emoluments received in the current financial year (Apr. 6 to Apr. 5) before any deduction is made for income tax, national insurance, pension or superannuation contributions. Family allowances . . . are excluded."

Paragraph 3 instructed tenants to apply personally to the clerk's department if they wished to claim a rebate. Paragraph 4 read as follows:

"Claims for alteration. Any increase or decrease in the gross income (see para. 2 above) necessitating a reassessment of rent must be notified immediately by the tenant or his agent calling at this office to complete the appropriate forms, produce such documentary evidence as may be necessary to substantiate a revision and leave the current rent card for alteration. Alterations in rent will be operative: (a) From the first rent collecting period after notification, as above, of any change of financial circumstances requiring a decrease in rent. (b) From the first rent collecting period after a change of financial circumstances arose requiring an increase in rent."

The tenant claimed and was granted the full rebate of 12s. per week; and he was given a rent card for the year 1955-56 which showed that on and after Apr. 4, 1955, his maximum net rent was 34s. 5d., and that after deduction of the rebate his rent was £1 2s. 5d., which with rates of 7s. 9d. made a total sum payable of £1 10s. 2d. At a later date the local authority reduced all rents by 5s. 1d.

per week, so that the tenant's maximum net rent became 29s. 4d., and the total sum payable by him became £1 5s. 1d. per week. During the summer of 1955 the tenant increased his earnings by working overtime. In January, 1956, the local authority wrote to all their tenants informing them that any claim for rebate for the year 1956-57 must be submitted during February accompanied by a certificate of income relating to the year 1955-56. On the figures submitted by the tenant the local authority came to the conclusion that as from June 6, 1955, the tenant was entitled to a rebate of only 2s. and that he had not been entitled to the full rebate of 12s.; and they contended that they were entitled to reassess his actual rent as from that date. For the year 1956-57, therefore, the local authority issued a rent card which showed the maximum net rent as "29s. 4d. + 10s.—1955-56." The sum of 10s. was added to the maximum rent of 29s. 4d. as a means of recoupment for what was alleged to have been an under-payment of actual rent during the previous year (by reason of the tenant's increased earnings); and the rebate was reduced to 2s. Thus the resultant figure for rent was shown as £1 17s. 4d. which with rates at 8s. 8d. made a total sum payable of £2 6s.

In October, 1956, the tenant left the premises in question and ceased to be a tenant of the local authority. Up to the date of leaving the premises he had paid the weekly rent demanded, i.e., £2 6s., but there remained outstanding, according to the local authority, the sum of £10 3s. 2d. in respect of the alleged under-payments during the year 1955. The local authority now claimed £10 3s. 2d. as arrears of rent. The local authority had also by their amended particulars of claim alleged that a further sum of £4 11s. 9d. was due and owing as arrears of rent under the tenancy which had been determined by the notice to quit dated Feb. 5, 1955, but the learned judge found that any such arrears had been extinguished; this particular point was not pressed in the Court of Appeal and is not referred to in this report.

Megarry, Q.C., and *A. J. Jenkins* for the local authority.

The tenant did not appear.

LORD EVERSHERD, M.R., referred to the notice to quit and the letter and the leaflet sent to the tenant and continued: It will be observed that in para. 4 of the leaflet there is a differential between cases for decrease, and cases for increase, and the differential may be justified as being a stimulus to tenants to make prompt disclosure of changes. However that may be, if a tenant is qualified to have a decrease, then he gets the decrease only from the time that he gives the necessary notification. If, on the other hand, his case requires an increase, then that increase operates from the time of change of circumstances, which may plainly be a past date at the time of the notification. The first question that arises, and on which the learned judge expressed a view, was as regards the meaning of the formula "gross income during the current financial year". It was the view of the judge that that formula could only mean, sensibly, gross income for a year already completed, since if you were calculating anything by reference to a year's income, then you would have to wait until the year was over before you knew what the income in total was. But counsel for the local authority has put forward formidable arguments for the view that, in its context, "gross income during the current financial year", which, I should add, was in para. 1 divided into a weekly rate, was intended to be something which would be calculated, and may be recalculated, during the progress of any given financial year, so that it would at any point of time be in part an estimate only. I do not feel it necessary, in the view that I take, to express a final conclusion; but in fairness to the local authority, I ought, I

think, to say that I must not be taken to be accepting the view which the learned judge took that "gross income for the current year" meant (and could only mean) gross income for a year already completed.

The significance of the other view put forward by counsel emphasises the local authority's wish for perfection; for the point was that if during any year a man's income went substantially up or substantially down, then the change should be reflected virtually at once in his rent—that is, his actual payable rent—so that from time to time his net rent would be properly related to his capacity to pay it. In an ideal world that, I should think, would be the fairest thing. There can be no doubt, however, that in practice it is capable of creating very grave difficulties. It will be recalled that para. 4 uses the phrase:

"Any increase or decrease in the gross income . . . necessitating a reassessment . . ."

I emphasise the first word, "*any*". Now many of the occupants of these houses are men or women whose wages or emoluments may vary quite appreciably. They may vary according to the season. They may (and this was the tenant's case) vary considerably if over a period a large amount of overtime is done; and, as ORMEROD, L.J., pointed out during the argument, this phrase requires that a man should reach a conclusion (which may be difficult) whether the increase or decrease which he is enjoying or suffering is, looking ahead, one which can be said to necessitate a reassessment. I do not, however, propose to pursue that aspect of the matter further, save only to add this. It may be that as a result of these proceedings, and the attention which has been given to them, there will be some change in the formulation of this scheme. I would, if I may properly do so, venture to suggest for consideration the advantages of simplicity which might be linked with a system correlating the payable rent to some past period; you could have, perhaps, three-monthly or six-monthly periods, and let the rent for the next period be related to the experience of the past, with a general power, of course, to the council to deal always with hard cases. It is, perhaps, going outside my proper sphere to say more; but I do venture to make that suggestion because, having considered this case, I cannot conceal that I have found very grave difficulty in construing some of the passages in these documents; and some of those who are tenants, I am sure, would find at any rate not less difficulty in construing them than I have.

[HIS LORDSHIP then considered the rent card that was given to the tenant in respect of his continuing to occupy the premises after Apr. 4, 1955, and continued:] During the summer of the year in question (1955-56) the tenant did a good deal of overtime; and ultimately the question arose whether his gross income for that "current year", within the meaning of the formula mentioned, had increased to such an extent as necessitated a reassessment, because, as will be recalled, he had enjoyed the full abatement. The local authority claims that by virtue of para. 4 of the leaflet (treating it as part of the contract) they were entitled to reassess the actual rent which the tenant should have paid from the date of his change of circumstances; and, to put it into figures, that he should, according to the local authority's view, have for some twenty-five weeks or so paid 10s. more per week than he had paid in fact.

The learned judge considered whether the local authority was in any case competent so to arrange with the tenant. He drew attention to the fact that the "maximum net rent" (namely, 29s. 4d. plus 10s.) is stated at a figure appreciably above the real maximum net rent; and, furthermore, it is pointed out that the tenant was paying 8s. a week more than the 29s. 4d. The judge's view, in addition to that which he had expressed on the meaning of "gross income",

was that the local authority had exceeded any powers that they had or might have, not having determined the tenant's tenancy, to impose or put forward those terms. Again I do not think that I need express any concluded view, because in truth the tenant accepted what was suggested. He continued in occupation. He paid the added rent, and certainly (unless he raised some claim for recoupment, which he has not done) I do not think that we can be asked to express any view other than that the rent card for 1956-7 recorded in truth a bargain to which the tenant had, by necessary inference, become a party. It is for that reason, therefore, that I have not thought it necessary to express a view of my own on these matters of the meaning of "gross income for the current year", and so forth. All might have gone quite well had it not been for the fact that in October, 1956, the tenant—whose financial circumstances, so the learned judge said, no doubt quite rightly, had by no means flourished—made up his mind to, and did, leave the premises, and that put an end to his tenancy of No. 61, Elizabeth Road. He did that at a time when he had not, by means of these additional sums of 10s. per week, discharged all that the local authority said constituted the sum of his under-payments during the previous year. The difference was £10 3s. 2d., and it is the claim of the local authority in the action to recover that as a debt, being rent in arrears.

In my judgment, the local authority are quite unable so to do; and, indeed, it seems to me that the argument to the contrary is wholly untenable. I doubt myself whether the terms of the contract at the time when the tenant left can be sought elsewhere than in his rent card, which states in terms the conditions of his tenancy. Even if regard can be had to the leaflet and the letter, I am quite unable to agree that in the circumstances at the date when the tenant left, there was anything due from him to the local authority by way of money due for unpaid rent. There is no warrant whatever for such a proposition in the rent cards, which show that he paid the rent regularly, and was up to date in the end with all the payments due under the current arrangement. I am inclined to think that whatever the local authority might have done, or say that they could have done (as to which I express no view), what they did or purported to do in fact or in law was this. They made an arrangement with the tenant, to which he assented, that in lieu of any payment back by him of any overpaid rebates (if that is the right phrase) he should, for the then ensuing year, pay an added 10s. a week by way of net rent until he had discharged a sum equivalent to the excess rebates. That, of course, would have been all right had he gone on during the requisite time; but since he determined the tenancy (as he was entitled to do) that automatically, as it seems to me, ended the obligation. In any case, in my judgment, the true, short and clear answer to the local authority's claim is that there were no arrears at the relevant date, and are not now any arrears of rent. I have referred to the cards, which show that there were none. There was in truth no reassessment of the rent as contemplated by para. 4 of the scheme. That paragraph, it will be recalled, contemplated that in the event happening of a relevant increase or decrease in gross income, the rent card would be altered, and the alterations in rent would be as there indicated. The rent cards were never altered.

I, for my part, share the judge's view that it would at best need extremely clear and strong language to enable a landlord *ex post facto*, and without the tenant's assent, to alter the rent or contractual sum in consideration of which the tenant was entitled to enjoy the premises. I am not satisfied—to put it no higher—that there is in these documents any sufficient warrant for such a power. Most certainly I do not find any warrant for any such power having been exercised; and therefore, I conclude without any hesitation that the

local authority are unable to establish that at the relevant date when this summons was issued, or when the tenant left, there was anything due to them for rent in respect of these premises. If that is so, then the action rightly failed, and was dismissed. I would accordingly dismiss the appeal.

MORRIS, L.J.: I agree so fully with all that my Lord has said that there is nothing that I desire to add.

ORMEROD, L.J.: I agree.

Appeal dismissed.

Solicitors: *A. F. & R. W. Tweedie, for Clerk to Havant and Waterloo Urban District Council.*

F.G.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J.)

June 5, 1958

ATTORNEY-GENERAL (at the relation of EGHAM
URBAN DISTRICT COUNCIL) *v.* SMITH AND OTHERS

*Town and Country Planning—Enforcement—Persistent evasion of statute—
Injunction—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51),
s. 12.*

In March, 1955, the first defendant began to use land belonging to him as a caravan site without obtaining planning permission. In April, 1955, an enforcement notice was served on him by the local planning authority under the Town and Country Planning Act, 1947, requiring him to remove the caravans from the land. He then applied for planning permission to use the land as a caravan site, but this was refused in May, 1955, and he appealed to the Minister of Town and Country Planning. An inquiry was held, and on December 31, 1955, the Minister dismissed the appeal. The first defendant, however, continued to use the land as a caravan site. In May, 1956, a further enforcement notice was served on him by the local planning authority, and in June, 1956, he made another application for planning permission, which again was refused. The caravans remained on the site, and in September, 1956, the first defendant was fined £25 for failing to comply with the enforcement notice of May, 1956. In October, 1956, after the local planning authority had taken out a summons for the daily penalty, the first defendant moved the caravans to a second site, which was the adjoining field. In November, 1956, he applied for planning permission in respect of that site, and that application was refused in January, 1957. In February, 1957, the local planning authority served an enforcement notice in respect of the second site, and in March, 1957, the first defendant moved the caravans from that site. In January, 1957, the defendant began to use a third site for caravans. Planning permission was applied for, but was refused in February, 1957. An appeal was made to the Minister which, after an inquiry, was dismissed in July, 1957. In August, 1957, planning permission was sought to put the caravans on another part of the third site, which was refused in September, 1957. The local planning authority served further enforcement notices in October, 1957, and in November, 1957, an appeal was made to the Minister which was dismissed. The Attorney-General, at the relation of the local planning authority, brought an action against the defendants for an injunction restraining the defendants from using or causing or permitting to be used as a caravan site any land within the boundaries of the local planning authority without the prior grant of planning permission under the Act. At the date of the hearing the caravans were still on the third site.

HELD: as the Attorney-General was suing for the purpose of enforcing a public right, even though that right was conferred by a statute which prescribed penalties for acts done in breach of it, the court had jurisdiction to grant an injunction: *A.-G. v. Wimbledon House Estate Co., Ltd.*, (1904), 68 J.P. 341, and *A.-G. (on the relation of Hornchurch Urban District Council) v. Bastow*, (1957), 121 J.P. 171, applied; and, as the defendants had shown an intention to act in breach of the Act of 1947 so far as they could and for so long as they could, an injunction would be granted.

ACTION by the Attorney-General at the relation of the Egham Urban District Council, to whom the local planning authority, the Surrey County Council, had delegated their functions under the Town and Country Planning Act, 1947, s. 34, as regards the urban district of Egham, for an injunction restraining the three defendants, Joseph Sidney Claude Smith, Modern Trailer Homes, Ltd., and Beatrice Pearlberg, and each of them by themselves, their servants or agents or otherwise from using or causing or permitting to be used as a caravan site any land within the boundaries of the urban district council of Egham without the prior grant of planning permission under the Town and Country Planning Act, 1947.

Megarry, Q.C., McKinnon, Q.C., and A. P. Leggatt for the Attorney-General. *Willis, Q.C., and Wingate-Saul* for the defendants.

LORD GODDARD, C.J.: This is an action by the Attorney-General, at the relation of the Egham Urban District Council, claiming an injunction restraining the defendants from using or causing or permitting to be used as caravan sites any land within the boundaries of the Urban District Council of Egham without previous planning permission.

The matter arises out of the provisions of the Town and Country Planning Act, 1947. Before I proceed to deal with the facts, let me say a word or two with regard to the Act itself. It is (as I think everybody knows) a somewhat difficult Act in many respects; and the procedure which is laid down under it is such that a very considerable time must very often elapse before questions whether there has been "development" or whether permission will be granted can be finally determined. A resolute defendant can make use of that state of affairs and may very likely develop land for certain purposes—and in this case we are concerned only with caravans, which seem to continue to have a particular attraction for the provisions of the Act—and be able to take advantage of the delays which the Act permits, so as to use land, contrary to the terms of the Act, for a very considerable period before the matter is finally decided.

The machinery provided by the Act is this. Section 12 (1) provides that:

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The sense of that sub-section is perfectly obvious, so it seems to me, and is that development of land carried out without permission is unlawful; it is contrary to the Act. It does not follow, because it is contrary to the Act, that a penalty is incurred at once.

The scheme of the Act is this. Before one develops land one must apply for permission, and if one does not apply for permission but nevertheless does any work on the land or makes any use of it which can amount to "development" within the meaning of the Act, one does it at one's own risk. An application for permission has to be made. If that permission is refused—and, no doubt, some time must elapse between the time when it is applied for and the time when the planning authority comes to a decision—an appeal lies to the Minister;

and there are then provisions requiring the Minister to send an inspector to hold an inquiry. That takes time. Then the inquiry is held; the inspector has to make a report; the report has to be considered by the Minister; and then a decision has to be given. The time which all these things take is well illustrated by what happened with regard to the first of the sites with which we are dealing. The matter first started about Apr. 12, 1955, when an enforcement notice was served alleging that the land had been used without permission—as it had been—since Mar. 28, 1955. The final decision was not given until Dec. 31, 1955, so that nine months elapsed between the time when this site was first used without permission and the time when the Minister decided the matter in favour of the Egham Urban District Council—for what the Minister decided did amount to a decision that the council were justified in refusing permission.

Section 23 of the Town and Country Planning Act, 1947, provides that, if the planning authority consider that any work does amount to development for which no permission has been given, they may serve an enforcement notice requiring the owner or occupier of the land to cease from putting the land to the use to which it is being put, or to cease from doing the particular acts which amount to development. But directly an application is lodged, the enforcement notice is stayed until after the appeal has been heard, so that in this case the enforcement notice was suspended for nearly nine months, the Minister's decision being given on Dec. 31, 1955. If the Minister finally dismisses the appeal, the enforcement notice, however, remains good, and then, if the land continues to be used in contravention of the enforcement notice, the planning authority may issue a summons on which the magistrates can impose a fine of up to £50 for the breach and a fine of £20 for every day on which, after the conviction, the use of the land continues without permission.

It seems that in March, 1955, the first defendant conceived the idea of using his farm, called Retreat Farm, in Chertsey, for the purpose of a caravan site. It was not only going to be a site for a few caravans, but was obviously going to be for a great many caravans. These caravans were not being put there for the purpose merely of holidays, but for the purpose of people living in them permanently.

By art. 3 of the Town and Country Planning General Development Order, 1950, the Minister granted a general permission to use land for certain purposes (as, for instance, the siting of caravans) for a period of not more than twenty-eight days. Therefore, if a farmer allows somebody to use land as a caravan site for a month during the summer holidays he will not be brought within the Act. But art. 4 (1) of the order gives the planning authority power to give a direction excluding that permission with regard to any particular district or place. In fact, such an order was made here.

It is perfectly obvious that the policy of the Egham Urban District Council, this district lying, as it does, within what is known as the "Green Belt", is to prohibit the use of land for caravan sites, or caravan towns, or whatever one may like to call them, within their district. I have not the least doubt, in the circumstances of this case, that the defendants knew that perfectly well. The first defendant may not have known it when he first started, in March, 1955, to bring caravans on to the land, but I am quite sure that within a very short time he must have known that that was the deliberate policy of the district council, and he set himself out to ignore that policy. If he could legally do that, he would be entitled to, and one would not attach any moral blame to him for that. At the same time, he was taking on a very considerable risk, not only for himself but also for the people who were living in these caravans as permanent dwellings. It is a very serious thing, if planning permission is required and has not been

obtained, to be letting these sites to unfortunate individuals who come there, presumably in the belief that there is power to have the caravans where they are, and then find themselves, having moved into them, in jeopardy of being turned out.

The history of the defendants' efforts to establish these caravan sites in face of the refusal of planning permission is this. The first piece of land with which we are concerned, Retreat Farm, was first used, apparently, on Mar. 28, 1955, when five caravans were brought there. On Apr. 12, 1955—within a fortnight—an enforcement notice, to expire on May 16, 1955, was sent, requiring the removal of these caravans. Section 18 of the Town and Country Planning Act, 1947, provides that, if a person carries out any development without permission (or in ignorance, as he may easily do, of the requirements of the Act), retrospective permission can be given; so the first defendant applied, on Apr. 23, 1955, for permission to use the land, and to continue to use it, for a caravan site. On May 25, 1955, that permission was refused. So he knew then, at any rate, that that was the attitude which the district council were likely to take up. There was nothing to show that that was anything to do with this particular site. It may be that he thought at the time that it was something to do with the particular site, although he has not told us that. It must have become perfectly clear to him that the objection of the district council was much more than to any particular site; it was because they are within the Green Belt and they were, therefore, determined not to have one of these mushroom towns springing up.

On July 18, 1955, the first defendant appealed to the Minister; and on Sept. 20 an inquiry was held. On Dec. 31, 1955, the appeal was dismissed by the Minister, who made it quite clear that he was not upholding the decision on the ground that there was some particular objection to the particular site, but that there was an objection to these caravan towns, or caravan settlements, or whatever one may call them, going up in the Egham Urban District Council's district near Chertsey because of it being in the Green Belt. The Minister, in dismissing the appeal, expressed the hope—he did not make it any condition—that the district council would act reasonably and not too precipitately, because it involved the dispersal of these unfortunate people who had taken themselves to this caravan site and found that the planning authority would not allow them to remain. The district council certainly did act with great restraint, because it was not until May 3, 1956, that they served another enforcement notice expiring on June 30, 1956. So that the first defendant had had from Dec. 31, 1955, to June 30, 1956, to comply with the notice; he had six months in which to get the land cleared of these caravans.

On June 20, 1956 (hope, I suppose, springing eternal in the human breast), he made a further application for permission. He did not know, but quite obviously he could expect, that it would be refused, as it was on Aug. 9, 1956. The district council by this time thought, no doubt, that the first defendant was simply defying them, and so they issued a summons on Aug. 14, 1956, which was returnable on Sept. 5, 1956. The magistrates imposed a fine of £25 and costs—which was certainly, I think, considering the defiance (practically) which the first defendant had shown here, a very moderate fine.

As the first defendant did not pay any attention to that at the time but still kept the caravans on his land at Retreat Farm, on Sept. 26, 1956, the district council took out a summons for the daily penalty. As the daily penalty was £20, a very considerable sum had already mounted up. So he got his caravans out. On Oct. 7, 1956, he moved them to the next-door field. That simply meant that he was going to keep the caravans. As he had been turned off

one site he was going to take another site. So he moved from one field to another and there, on Oct. 7, on a site called Maindy, he installed the caravans. On Nov. 6, 1956, after they had been there for a month without permission, he applied again for permission; and on Jan. 15, 1957, it was refused. He no doubt thought (or I will assume that he thought) that he could use Maindy for a further twenty-eight days under the general permission. On Jan. 21, 1957, the direction issued by the district council under art. 4 (1) of the General Development Order came into force.

On Feb. 9, 1957, the first defendant appealed to the Minister against the refusal of planning permission in respect of the Maindy site. On Feb. 13, 1957, an enforcement notice was served, taking effect on Mar. 16, 1957. But on Mar. 23, 1957, the caravans had gone. The first defendant said that he had parted with any interest that he had in the land, because by this time, apparently, he had got the idea of going to another adjoining site which is referred to as Royal Hythe Farm. The history with regard to Royal Hythe Farm is this. The defendant company, of which the first defendant was a director, had now come into the picture, and on Jan. 26, 1957, applied for planning permission. It was here that the warning notices, saying that the site was not an authorised site, were put up. On the very day on which permission was applied for, the caravans started to move in. A very considerable number had moved in by Feb. 6, 1957, the date when planning permission was refused. That did not daunt the defendants, because, by Mar. 28, 1957, there were 119 caravans there and by Apr. 3, 1957, there were 156. By this time an appeal had been made to the Minister, and on Mar. 11, 1957, a writ had been issued, the planning authority being relators, and application had been made to the court for an interim injunction. When the summons came before the judge in chambers, no order was made, because counsel gave an undertaking that no more caravans would be moved on to this site. But there they were: there were 156. On June 14, 1957, another public inquiry was held; and on July 26, 1957, the appeal to the Minister was dismissed.

On Aug. 29, 1957, planning permission was again sought, this time to put the caravans on another part of Royal Hythe Farm, moving them quite a short distance. This really shows that it was getting to be, I might almost say, something in the nature of a scandal, because everybody knew at this time that it was not the particular field that was objected to but it was that the district council were not going to have these sites. On Sept. 18, 1957, that application was refused.

I have mentioned the matters which happened after that date as showing that the defendants intended to hold the Act at defiance as far as they could by going on making these repeated little moves from one field to another, or from one part of the farm to another part of the farm, and then applying for permission which they knew they would not get, and then appealing to the Minister and getting an inquiry, so that they could get fifteen or sixteen months' grace in which they could let caravans on the site and could take the profits for them. On Oct. 23, 1957, further enforcement notices were served. On Nov. 30, 1957, there was an appeal to the Minister, and that appeal has followed the way of all the other appeals and the Minister has refused to disturb the decision of the district council.

It has been submitted to me that, because the Act provides penalties and because no offence is committed before the enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases that have been cited, particularly *A.-G. v. Wimbledon House Estate Co., Ltd.* (1), which

was cited and followed by *DEVLIN, J., in A.-G. (on the relation of Hornchurch Urban District Council) v. Bastow* (1), show that, although a statute may provide a penalty for acts done in breach of it, or in respect of acts done for which it provides a penalty, if it is a matter of public right then, the Attorney-General is entitled, on behalf of the public, to apply for an injunction. Of course, the Town and Country Planning Act, 1947, is an Act which is designed to confer a benefit on the public; it is for the orderly development of the countryside, to prevent unsightly development, to prevent the development of too crowded areas, to prevent the development taking place of industrial buildings and plant in what should be a residential district, and for the mapping out of residential districts and industrial districts, and so forth. It is obviously an Act which is designed for the public good, and can be used for great public advantage. Therefore, if a defendant shows by his conduct that he intends to avoid the Act and act in breach of it so far as he can and for as long as he can, then the Attorney-General is entitled to an injunction such as was granted in the cases which have been cited to me.

Here, I think it is quite clear that the defendants, having got their caravans on to a particular site, started by carrying on a fight with regard to that site for a good many months. They carried on that fight from March to December, 1955. Then, although the appeal had been dismissed, they took no notice but because the Egham Urban District Council acted reasonably so as to allow the unfortunate people living in the caravans time to get out, they managed to carry on the fight for another six months. So that from March, 1955, to the end of September, 1956, the defendants had the advantage of letting caravan sites, which they had developed without permission and permission for which had been withheld all the way through. They got a run, therefore, of somewhere near eighteen months. It is clear that, by moving the caravans to the field next door, they meant to continue using land for this purpose, which was a development for which they had no permission. It was only when they found that they could not get any further with that site—although they managed to keep their caravans there from Oct. 7, 1956, till Mar. 22, 1957, so they had another pretty good run—that they decided to go to the Royal Hythe Farm site, and they have been using that site for caravans from Jan. 26, 1957, and I understand the caravans are still there, although the Minister dismissed the appeal on July 26, 1957. That shows an intention by the defendants, who have been refused permission time and again, to act in defiance of the Act and to use its machinery not for the purpose of making genuine application for permission but for the purpose of delay. In the first instance I would not say they were not perfectly entitled to appeal to the Minister. When they got the result of their appeal to the Minister, they knew quite well that the Minister was upholding the policy which this planning authority were evidently following—that is to say, not to permit the use of land for caravans within their area because of the considerations relating to the Green Belt. The Minister upheld them, and yet the defendants went on in this way.

I think, therefore, that this is a case in which I have jurisdiction to grant an injunction; and, if I have jurisdiction to grant an injunction, I most certainly as a matter of discretion will grant it. There will be judgment for the Attorney-General for an injunction and the defendants must pay the costs of the action.

Order accordingly.

Solicitors: *Champion & Co.; Clarke & Co.*

G.A.K.

Eugene

COURT OF CRIMINAL APPEAL

LORD GODDARD, C.J., BARRY AND ASHWORTH, JJ.)

June 9, 23, 1958

R. NOSEDA. R. v. FIELD. R. v. KNIGHT.
R. v. FITZPATRICK

Criminal Law—Sentence—Borstal training—Further offences committed while on licence, absconding, or absent without leave from Borstal—Principles applicable.

Though there is no general principle under which a second or third sentence of Borstal training is appropriate or inappropriate, and though each case must be considered on its particular facts, occasions on which a third sentence is appropriate are likely to be rare.

The first factor to consider is whether the offender is (i) a person released on licence from Borstal, (ii) an absconder from Borstal, (iii) an absentee without leave from Borstal. In the case of a further offence by an offender within group (i), the court should ascertain what period of his original training is outstanding in the event of his being recalled, and whether he will be recalled to Borstal. As a general rule, a sentence of a short term of imprisonment with a view to recall is appropriate in this case, unless the Prison Commissioners indicate that the offender will not be recalled or the further offence is so serious as to require a substantial sentence. If, however, the Prison Commissioners report that the offender made a good response to Borstal training, but appears to need a longer period of training than one remaining part of his original sentence would provide, a further sentence of Borstal training may be appropriate. In the case of an offender within group (ii), if the absconding and the further offence take place within approximately the first twelve months of the original Borstal sentence, a short term of imprisonment with a view to recall is desirable, but if the absconding and further offence take place after that period, the court may take the view that further Borstal training is not likely to be beneficial and that a sentence of imprisonment is appropriate. A person absent without leave who commits a further offence during his absence should ordinarily be treated as an absconder.

APPEALS against sentence.

These were appeals against sentences of Borstal training passed on the appellants at quarter sessions. In each case the appellant on a previous occasion, or occasions, had been sentenced to Borstal training and the appellants' grounds of appeal were that further sentences of Borstal training would not benefit them. The first two appellants, George Edward Noseda and Michael Frederick Field, were now respectively aged twenty and nineteen. Noseda was first sentenced to Borstal training on May 23, 1955, for offences of officebreaking and larceny; previously he had been put on probation on three occasions and fined once. Noseda was released on licence from Borstal on Nov. 7, 1956, and on Apr. 1, 1957, he received a second sentence of Borstal training for housebreaking and larceny. Field was first sentenced to Borstal training in January, 1957, for the offence of taking and driving away a motor car without the owner's consent, previously having been before a juvenile court on three occasions, the last of which resulted in his being sent at the age of thirteen to an approved school; he was put on probation in January, 1956, for three years and was fined in November, 1956, for driving a motor car without a licence or insurance policy. In June, 1957, Field absconded from Borstal but was recaptured and sent for a time to a Borstal corrective centre; thereafter he was sent back to the Borstal training centre from which he absconded to resume his training. In January, 1958, Noseda and Field together absconded from Borstal, broke and entered a dwelling-house and stole a cigarette lighter and took and drove away a motor car without the owner's consent. They were brought before Middlesex Quarter Sessions on Mar. 6, 1958, where they pleaded guilty to these offences. The report of the Prison Commissioners on Noseda stated it was the commissioners'

view that he should continue his Borstal training under his existing sentence, but that a fresh sentence of Borstal training would not be of advantage. The commissioners' report in Field's case stated that it would be better for him to continue Borstal training, but that if the court thought the unexpired portion of his sentence insufficient he was suitable for a further sentence. Nosedá and Field were sentenced by quarter sessions to further periods of Borstal training, two other offences committed by them being taken into consideration, from which they now appealed; this was Nosedá's third sentence of Borstal training and Field's second.

The third appellant, John Knight, was now aged eighteen and previously had been before juvenile courts and had been sent to an approved school and a detention centre. Knight was first sent to Borstal in January, 1957, for offences of garage breaking and larceny, larceny of a motor car and possessing housebreaking implements by night, three other offences being taken into consideration. He absconded from Borstal on May 7, 1957, but was recaptured and returned there on May 9, 1957. On Jan. 21, 1958, he failed to return to Borstal from home leave and while at large he committed over twenty offences. On Mar. 21, 1958, he was brought before Surrey Quarter Sessions and convicted of taking and driving away a motor car without the owner's consent and of possessing housebreaking implements by night, for which offences he received a second sentence of Borstal training; and on Mar. 27, 1958, he was brought before the County of London Quarter Sessions and convicted of shopbreaking and larceny and taking and driving away a motor car without the owner's consent for which a third sentence of Borstal training was passed on him from which he now appealed.

The fourth appellant, George Peter Fitzpatrick, was now aged nineteen, and had a bad record as a juvenile. He received his first sentence of Borstal training in January, 1956, for shopbreaking and larceny; he was released on licence on Sept. 5, 1957, and on Mar. 28, 1958, he was convicted at Salford Quarter Sessions of attempted burglary, being in possession of housebreaking implements by night, housebreaking and larceny and received a second sentence of Borstal training, one other offence being taken into consideration. The report of the Prison Commissioners on Fitzpatrick stated that the commissioners would be prepared to recall him for a period of special training at the Borstal recall centre. He now appealed against sentence of Borstal training.

No counsel appeared.

Cur. adv. vult.

June 23. LORD GODDARD, C.J., read the following judgment of the court: In each of these cases leave had been granted to the appellant to appeal from an order made by a court of quarter sessions that he should be sent to Borstal for training and in each case a similar order had been made by a court on a previous occasion. The question which arises in each case is whether it is desirable that a person should be sent to Borstal for training on a second, or possibly a third, occasion, and as this is a problem which quite frequently arises, the court decided to determine the appeals but to put into writing the reasons for its decision, in the hope that they may be of some guidance to courts which are required to deal with similar problems in the future.

In the first place, although it is hardly necessary to say so, each case must be considered on its own particular facts, and there is no general principle applicable to all cases under which a second or indeed a third sentence of Borstal training is to be regarded either as appropriate or inappropriate. The most that can be said is that the occasions on which a third sentence is appropriate are likely to be rare.

In our view, the first factor to consider is whether the offender is (a) a person who had been released from Borstal on licence or (b) an absconder from Borstal or (c) a person who had remained absent without leave from Borstal, for example, after a visit to his home.

(a) We deal first with the case of a person released from Borstal on licence. He may fairly be said to have shown some response to his training and is *prima facie* in a different class from a person who either absconds from Borstal or is absent without leave. When a person is released from Borstal on licence, he is liable to recall to Borstal to complete his training and under s. 45 (4) of the Prison Act, 1952, remains so liable for a period of four years from the date of his sentence. Then he may be detained till the expiration of three years from the date of his sentence or for a period of six months from the date when he is taken into custody under the order of recall whichever is the later. If such a person commits an offence or offences while on licence and is brought before a court which has jurisdiction to send him to Borstal, it is in our view important that the court should know what period of his original training is outstanding in the event of his being recalled to Borstal and whether he will in fact be recalled to Borstal. As we understand it, the practice of the Prison Commissioners is to recall to Borstal a person who has committed an offence while released on licence, unless the court imposes a fresh sentence of Borstal or imposes a substantial sentence of imprisonment.

For a person in this class we think that, as a general rule, the appropriate order in respect of the offence committed by him while released on licence is a short term of imprisonment with a view to his recall to Borstal. The short sentence of imprisonment is required so that he may be detained in custody pending his recall to Borstal and, in passing sentence, the court should make it clear that recall to Borstal is intended. This course would not, however, be appropriate if the Prison Commissioners indicate that the accused person would not be recalled to Borstal. Nor would recall be appropriate if the nature of the further offence was so serious as to call for a substantial sentence. On the other hand, if the commissioners report that the offender did make a good response to training but appears to need a longer period of training than the remaining part of his sentence would provide, a further sentence of Borstal may be appropriate.

(b) A person who absconds from Borstal thereby indicates his unwillingness to respond to the discipline and training provided in Borstal but that is not of itself a valid reason why he should not be required to submit to them. If an absconder is brought before a court for a further offence committed while at large, we think that if the absconding and further offence take place early in his training, say within twelve months or so of the original sentence, a short term of imprisonment with a view to recall is desirable. We assume that in such cases absconders will be sent to the correction centre before resuming training. On the other hand, if the person absconds after undergoing more than twelve months of training and commits an offence, the court which has to deal with him, or the Prison Commissioners, may take the view that further Borstal training is unlikely to be of benefit and accordingly that imprisonment is the only alternative.

(c) A person who is absent without leave from Borstal and commits a further offence should ordinarily be treated as an absconder.

Before preparing this judgment the court has had the advantage of ascertaining the practice of the commissioners in regard to these varying types.

The first two appeals before us were those of Noseda and Field, and they were heard together. Noseda is now twenty years of age and Field nineteen. Noseda was first sent to Borstal in May, 1955, and was released on licence in November,

1956. In April, 1957, he was again sentenced to Borstal and in January, 1958, he absconded with Field and in his company committed four offences for which he received in March, 1958, a third sentence of Borstal training. Field was first sent to Borstal in January, 1957, and after absconding and being recaptured he absconded again with Noseda in January, 1958. Having regard to the ages and histories of these two appellants, and having considered the Prison Commissioners' reports on them, we decided that a further period of Borstal training was not likely to be of value and accordingly we substituted in respect of each of them a sentence of eighteen months' imprisonment.

The appellant Knight is eighteen years of age and was first sent to Borstal in January, 1957. He absconded in May, 1957, but was recaptured. In January, 1958, after completing twelve months of his sentence he failed to return from home leave and committed over twenty offences. In March, 1958, he received a fresh sentence of Borstal training at Surrey Quarter Sessions for offences committed in that county and six days later he also received a sentence of Borstal training at the County of London Quarter Sessions for offences committed in that county. In our view the course taken by Surrey Quarter Sessions was entirely justified and although in the circumstances the third sentence of Borstal training passed at the County of London Sessions was in a sense unnecessary, we saw no reason to alter it and dismissed the appeal.

The appellant Fitzpatrick is nineteen and was first sent to Borstal in January, 1956. He was released on licence in September, 1957, but in February, 1958, he committed further offences and was again sentenced to Borstal training. In our view this is a case in which completion of the original Borstal training should be enforced and accordingly we substituted a sentence of three months' imprisonment with a view to the appellant's recall to Borstal.

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BARRY AND ASHWORTH, JJ.)

June 16, 23, 1958

R. v. ADAIR

Criminal Law—Trial—Retirement of jury—Question to court indicating different approach to issue—Necessity for further direction.

Criminal Law—Verdict—Substitution—Conviction of burglary and larceny—Jury discharged from giving verdict on alternative count for receiving—Verdict of Guilty of receiving substituted—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 5 (4).

There is no general rule that, where a jury, after retirement, return and put a question to the court which indicates an approach to the issue different from that put forward by the Crown, the judge should give a further direction and review all the evidence relevant to the matters arising out of the question, but if the form of the question shows that the jury appear to be assuming facts or drawing inferences for which there was no supporting evidence, further direction is necessary, and the jury should be reminded how far the relevant evidence went.

The appellant was charged with burglary and larceny, and, alternatively, with receiving part of the stolen property. Counsel for the Crown had invited the jury to convict of burglary and larceny on the basis that the appellant had himself broken and entered the premises named. No suggestion was made that he should be convicted on the basis that, while not taking part in the actual burglary, he had organised or assisted in it and thereby become an accessory before the

fact, and the summing-up contained no reference to this point. The jury, after retirement, returned and put this question to the court: "If [the appellant] in fact remained at [his flat], but organised the breaking-in of the [premises named], put pressure on someone to carry out the breaking, and supplied a key or other equipment, could [he] be found Guilty of burglariously breaking and entering the premises?" The judge replied: "The answer is, he is an accessory before the fact and the short answer is 'Yes.'" The jury convicted on the count charging burglary and larceny and were discharged from giving a verdict on the count which charged receiving.

HELD: that a more detailed direction was called for in the circumstances of the case; that on this ground the conviction of burglary and larceny could not be upheld; but that the court, exercising its powers under s. 5 (2) of the Criminal Appeal Act, 1907, would substitute a verdict of Guilty of receiving.

APPEAL against conviction.

The appellant was convicted at the County of London Quarter Sessions on March 14, 1958, of burglary and larceny and was sentenced to eighteen months' imprisonment. On a second and alternative count for receiving the jury were discharged from giving a verdict, so far as the appellant was concerned. On a third count, which charged a different offence of receiving, the appellant was convicted, but he did not appeal against the conviction on that count.

The appellant was charged jointly with a woman named Farin, who was convicted of receiving on the second count. The incident out of which the charge in the first count arose occurred in the night of December 8-9, 1957, when a public house was entered and the cigarettes and liquor stolen. Counsel for the Crown had invited the jury to convict the appellant and the woman Farin on that count on the basis that they had themselves broken and entered the premises. No suggestion was made that he had organised or assisted in the crime and was liable to be convicted as an accessory before the fact, and the summing-up contained no reference to that point. After two hours the jury returned desiring further direction on a point of law as follows: "If Adair in fact remained at [his flat], but organised the breaking in . . . put pressure on someone to carry out the breaking, and supplied a key or other equipment, could he be found Guilty of burglariously breaking and entering the premises?" The deputy chairman replied: "The answer is, he is an accessory before the fact and the short answer is 'Yes.'" After a very short retirement the jury returned a verdict of Guilty on the first and third counts.

Lawton, Q.C., and C. G. L. Du Cann for the appellant.

Cassell for the Crown.

Cur. adv. vult.

June 23. **ASHWORTH, J.**, read the following judgment of the court: This appellant was charged together with a woman named Farin at the adjourned quarter sessions for the County of London in an indictment containing three counts. In the first count they were jointly charged with breaking and entering a dwelling-house and stealing over eighty thousand cigarettes, nine bottles of whisky and five bottles of brandy; in the second count they were jointly charged with receiving sixty-eight thousand cigarettes knowing them to have been stolen. In the third count they were jointly charged with receiving a wireless set knowing it to have been stolen. The appellant was found guilty on the first and third counts, while the woman Farin was found not guilty on those counts but guilty of receiving five hundred cigarettes which were found amongst her personal belongings. The appellant did not challenge the verdict or sentence on the third count, but contended that as a matter of law he was wrongly convicted on the first count.

The incident out of which the charge in the first count arose occurred in the night of Dec. 8/9, 1957, when premises known as the Royal Oak public house

were entered by means of a key which fitted one of the doors of the bar, and the cigarettes and liquor were stolen. On the following day police officers visited a flat occupied by the appellant and the woman Farin and there they found stacked round a gas stove cartons containing sixty-eight thousand cigarettes some of which could be identified as having come from the Royal Oak. They also found equipment suitable for making keys, including some Plasticine bearing the impression of a key. The appellant's explanation to the police, which he repeated in his evidence at the trial, was that the cigarettes must have been deposited in the flat by a lodger named Bill, and that he, the appellant, had nothing whatever to do with the entry into the Royal Oak or the stealing therein. The key-making equipment was said by him to have been in his possession for amusement purposes only.

Counsel for the Crown invited the jury to convict the appellant and Farin on the first count on the basis that they had themselves broken and entered the Royal Oak. No suggestion was made that the appellant should be convicted on the basis that while not taking part in the actual burglary he had organised or assisted in the crime and was accordingly liable to be convicted as an accessory before the fact.

In his summing-up the deputy chairman dealt fully and accurately with the law and the facts on the footing that the appellant was alleged to have broken and entered the premises himself. In the absence of any suggestion that the appellant might be convicted as an accessory it is not surprising that the summing-up contained no reference to that point.

The jury retired to consider their verdict and two hours later they returned, desiring further direction on a point of law which they expressed in the following terms: "If Adair [the appellant] in fact remained at 15, St. Luke's Road (his flat) but organised the breaking-in of the Royal Oak public house, put pressure on someone to carry out the breaking and supplied a key or other equipment, could Adair be found guilty of burglariously breaking and entering the premises?" The deputy chairman's reply was as follows: "The answer is, he is an accessory before the fact, and the short answer is: 'Yes'". After a very short further retirement the jury returned a verdict of guilty against the appellant on the first count.

Counsel for the appellant contended that in the circumstances and having regard to the way in which the case for the Crown had been presented, the short further direction given by the deputy chairman was inadequate. He did not contend that if the three elements mentioned in the jury's question had been proved by evidence, namely, organisation, pressure and the supply of a key, the deputy chairman's answer would have been wrong in law. His contention was that there was no evidence whatever to support two of the elements, namely, organisation and pressure, and that the deputy chairman should have directed the jury that their approach to the problem involved assumptions which the Crown had not suggested and which were not supported by the evidence.

In our view, it would not be right to say that in every case where by the form of their question a jury indicate a different approach to the problem from that which was put forward on behalf of the Crown, it is necessary by way of further direction to review all the evidence relevant to the points involved in the jury's question. If, however, the form of the question shows that the jury appear to be assuming facts or drawing inferences for which there was no supporting evidence, further direction is called for and they should be reminded how far the relevant evidence went. In the present case there was certainly no evidence that the appellant put pressure on someone to carry out the breaking-in and it is not possible to say that if the jury had been reminded of the absence of any

such evidence, they would have convicted the appellant on the first count. While we have no wish to criticise the deputy chairman, who was confronted by a difficult question, we are of opinion that a fuller direction was called for than that contained in his short answer, and on this ground the conviction on the first count cannot be upheld.

Having regard to their verdict on the first count the deputy chairman rightly discharged them from returning a verdict in respect of the appellant on the second count. The question now arises whether this court should substitute for the verdict of guilty on the first count a verdict of guilty on the second count, in pursuance of s. 5 (2) of the Criminal Justice Act, 1907. That sub-section is in the following terms:

"Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

In the first place it is clear that as the jury were discharged from returning a verdict in respect of the appellant on the second count, there is no such obstacle to the application of s. 5 (2) as existed in *R. v. Melvin* (1). In that case the jury had acquitted the prisoners on a count of larceny and this court held that it had no power in the circumstances to substitute a verdict of guilty of larceny, although the facts would certainly have warranted such a course. When s. 5 (2) is invoked, the question arises whether it is clear to this court that the jury must have been satisfied of facts which proved the prisoner guilty of the other offence: see *R. v. Smith* (2).

In our view, it is plain from the terms of the jury's question and their subsequent verdict on the first count that they must have rejected the explanation offered by the appellant for his possession of the cigarettes and the key-making equipment. It is equally plain that they must have been satisfied that the appellant was directly implicated in the theft and that when the cigarettes came into his possession he must have known that they were stolen. Confirmation of this view is to be found in the fact that the jury convicted the woman Farin of receiving five hundred cigarettes, which had been given to her by the appellant.

In these circumstances we think that the present case falls well within the ambit of s. 5 (2) and accordingly we substitute for the verdict of guilty on the first count a verdict of guilty on the second count. The sentence of eighteen months' imprisonment which was passed in respect of the first count will stand as the sentence on the substituted verdict.

Verdict of guilty of receiving on second count substituted for verdict of guilty on first count.

Solicitors: *Sampson & Co.; Solicitor, Metropolitan Police.*

T.R.F.B.

(1) 117 J.P. 95; [1953] 1 All E.R. 294; [1953] 1 Q.B. 481.

(2) (1923), 17 Cr. App. Rep. 133.

HOUSE OF LORDS

(LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM,
LORD SOMERVELL OF HARROW AND LORD DENNING)

April 16, 17, 24, June 25, 1958

LONDON TRANSPORT EXECUTIVE v. BETTS (VALUATION OFFICER)

Rates—De-rating—Industrial hereditament—Whole premises used for maintenance of road vehicles—Rating and Valuation (Apportionment) Act, 1928 (18 and 19 Geo. 5, c. 44), s. 3 (1), (2).

The appellants occupied a dépôt for work on their omnibuses, each omnibus being completely overhauled every three and a half years. On the question whether the dépôt was an industrial hereditament for rating purposes within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, or was excepted from that definition by s. 3 (2) as being a "place used . . . for the . . . maintenance of" the appellants' vehicles,

HELD (LORD DENNING dissenting): the word "maintenance" in s. 3 (2) included the overhauling and re-conditioning of the vehicles carried out in the present case; the exception in s. 3 (2) of "any place used . . . for the . . . maintenance of" road vehicles applied where the place so used was the whole of the hereditament (as in the present case) as well as where it was merely a part of the hereditament, and, therefore, the dépôt was not an industrial hereditament within the meaning of s. 3 of the Act.

APPEAL by the London Transport Executive from an order of the Court of Appeal (LORD EVERSHERD, M.R., MORRIS and PEARCE, L.JJ), reported 121 J.P. 530, dismissing an appeal by the Executive by way of Case Stated from a decision of the Lands Tribunal. The Tribunal had held that the hereditament known as Aldenham Dépôt, Elstree, owned and occupied by the appellants, should be entered in Part 1 of the valuation list for Harrow Urban District, with a rateable value of £20,300. The appellants appealed on the ground that at all material times the dépôt had been occupied and used for industrial purposes—the major overhaul and re-building of road omnibuses—and ought to be treated as an industrial hereditament in accordance with the Rating and Valuation (Apportionment) Act, 1928.

*Sir Andrew Clark, Q.C., Rowe, Q.C., and Widdicombe for the appellants.
Lyell, Q.C., and P. R. E. Broune for the respondent.*

The House took time for consideration.

June 25. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the question arising on this appeal is whether a hereditament occupied by the appellants and known as "the Aldenham Dépôt" is an "industrial hereditament" as defined by the Rating and Valuation (Apportionment) Act, 1928, which I shall call "the Act of 1928", and is, accordingly, entitled to the benefit of the "de-rating" provided by s. 68 of the Local Government Act, 1929. The Central Middlesex Local Valuation Court, the Lands Tribunal (Mr. ERSKINE SIMES, Q.C.), and the Court of Appeal have all answered this question in the negative.

The definition of an industrial hereditament is to be found in s. 3 of the Act of 1928, the relevant provisions whereof are as follows:

"(1) In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used . . . subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied

and used for the following purposes or for any combination of such purposes, that is to say—(a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop.

"(2) For the purposes of this Act—... (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

By s. 149 (1) of the Factory and Workshop Act, 1901, the expression "factory" has the following meaning assigned to it, so far as material to this appeal:

"Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them; that is to say:—... The expression 'non-textile factory' means—... (c) any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there.

"The expression 'factory' means textile factory and non-textile factory or either of those descriptions of factories..."

The Lands Tribunal Act, 1949, provides, by s. 3 (4):

"A decision of the Lands Tribunal shall be final; Provided that any person aggrieved by the decision as being erroneous in point of law may... require the tribunal to state and sign a case for the decision of the court..."

My Lords, it is not in dispute that the Aldenham depôt is a "factory" within the definition contained in s. 149 (1) of the Factory and Workshop Act, 1901, but the tribunal in the present case found that the activities carried on by the appellants at the depôt were the maintenance of their road vehicles within the meaning of s. 3 (2) (b) of the Act of 1928 and that, therefore, the depôt was not an "industrial hereditament" within the definition in s. 3 (1) of the same Act. The question stated by the tribunal for the decision of the court was "whether on the findings of fact he came to a correct decision in law", and that question can conveniently be divided into two parts—(i) Did the tribunal fall into any error of law in holding that the activities carried on by the appellants at the depôt were the maintenance of their road vehicles? (ii) If the tribunal fell into no such error in so holding, were the tribunal and the Court of Appeal right in holding that, on the true construction of s. 3 of the Act of 1928, the depôt is not "an industrial hereditament"?

Before considering the first question, it is necessary to set out the facts on which the decision of the tribunal was given. I find it impossible adequately to summarise the very clear findings of fact, and I think it is necessary to quote them at length, in order to give an accurate picture of the appellants' activities.

"The depôt is registered as a factory under the Factory and Workshops Acts.

"It was used at the material time for the periodical overhaul of the omnibuses used by the appellants and for the repair of major accidents suffered by such vehicles.

"The work of overhaul is divided between the dépôt and the Chiswick works of the appellants. At the date of the proposal, Mar. 29, 1954, the overhaul work at the dépôt consisted of the overhaul of the body only, the chassis being merely prepared for dispatch to the Chiswick works for overhaul there, although heavy repairs to the chassis frame were carried out at the dépôt.

"The overhaul of the appellants' vehicles is done to a programme, each vehicle being completely overhauled every three and a half years, maintenance and repair work (other than in cases of major accidents) in the intervening period being carried out at the local garages of the appellants.

"On arrival at the dépôt a vehicle is inspected and all parts requiring attention are marked with chalk and entered on a schedule. It is then taken to the body dismount shop where the body is removed from the chassis by an overhead crane. The chassis was then taken to the chassis preparation shop where it was cleaned and made ready for despatch to the Chiswick works for overhaul there. After overhaul it was returned to the dépôt, but it was improbable that, on its return, its former body would be replaced on it, since the chassis went into stock and would in due course be drawn out and fixed to the body next in turn for despatch. The body is taken to a piece of machinery called an inverter, which enables it to be turned on its side for washing and for the carrying out of certain underfloor and roof repairs.

"From the inverter the body is taken by crane to the body repair shops. Here it is mounted on stilts which form a jig and hold the body at a convenient height for working between fixed gantries which afford convenient access at different levels. All defective parts are removed and subsequently go to appropriate shops elsewhere for reconditioning (if possible). The parts so removed are replaced by new or reconditioned parts taken by the men engaged on the job from stocks stored in what are known as cafeteria racks running along the side of the shop. The extent of the replacements carried out are, on the average, 1,940 pieces out of a total of 7,500 which constitute the total body; of these 1,940 pieces some 1,740 are reconditioned and subsequently re-used. These numbers exclude nuts, bolts and screws.

"The body having been reintegrated, is then taken by overhead crane to another inverter, where a coating of protective paint is applied to the underside.

"From there it is carried to the mount shop where it is again mounted on a chassis, which has been overhauled at Chiswick and returned to the dépôt.

"It is then towed to the rectification shop, where it is inspected. It then goes out on a road test and returns to the rectification shop for the correction of any faults shown on the road test.

"From there it is towed to the preparation shop where it is prepared for painting and where certain minor painting, such as the cream line, is put in by hand. Here, in addition to rubbing down, masks or protective coverings are applied to those parts not to be painted the familiar red or green.

"In certain cases where the paint work is very bad, such as cases where small dents have been beaten out in situ, the vehicle may have previously

been taken through the special preparation shop where the existing paint is chemically removed.

"After preparation the vehicle goes to the paint shop where it is painted with one coat of colour by electrical sprays hand operated. It is there air dried and the transfers are put on during this drying period. It then receives two coats of varnish and is oven dried after each coat.

"The vehicle then goes to the finishing shop where the reconditioned cushions and upholstery are fitted and any small touchings up and finishings are carried out.

"Finally the vehicle goes to the licensing garage where it is inspected by the transport executive rolling stock engineer and the licensing authorities before it goes back to its own garage. For the purposes of the taxation officers, the bonnet number, the maker's chassis number and the registration number have to agree, and in view of the separation of body and chassis in the early stages of the overhaul and the substitution of a different reconditioned chassis at a later stage, body and chassis are re-numbered so as to correspond with the licence.

"The whole process of overhaul of a vehicle from the time it enters to the time it leaves the dépôt occupies about three weeks.

"So far as major accident repairs are concerned, of which during the year ended March, 1954, there were an average of between ten and twenty vehicles a week, the vehicle is first inspected and the necessary body repair work carried out in the accident repair shops and any necessary repainting consequent upon such repairs done in the accident painting shop. Damage to the chassis would also be repaired in the dépôt in the development shops.

"Even if a vehicle incurred a major accident within a short period before it was due for overhaul, it would go first to the accident repair shop for the accident damage to be repaired before it underwent overhaul though in such cases the repainting would be omitted in view of the complete repainting which each overhauled vehicle receives.

"All defective parts whether removed from a body in the body repair shops or the accident repair shop are first examined to see if they are capable of reconditioning. If they are so fit they are collected in the pre-repair stores where they are made up into batches and sent to the appropriate shops in the dépôt where they are reconditioned. After reconditioning metal parts are stove-enamelled and timber parts hand-painted. They are again inspected and then go to the progress body repair stores which together with the main stores, which are used primarily for new material, form the reservoir from which the cafeteria racks are kept stocked.

"There are two of the reconditioning shops of which special mention may be made, the trimmers' shop and the board and blinds shop. In the former the cushions and upholstery are cleaned, repaired and rebuilt, and the leathercloth used for lining the omnibus and linoleum and cork tiles are cut to the necessary size from new material. In certain cases it proves necessary for new moquette to be used as the outer cover for the cushions and squabs (or backs of the seats), and this also is cut out and fitted in this shop. The extent of the reconditioning of the cushions and squabs varies from cleaning and a repaint of the back of the squab to a complete stripping to pieces and reassembling as in the original manufacture.

"In the boards and blinds shop, destination blinds are repaired or reconditioned. During 1954 five hundred new blinds were made and three hundred and seventy reconditioned on an average each week.

"There was also at the dépôt a plant shop used for the maintenance and servicing of the plant used on the premises and the manufacture of certain plant and equipment for such use.

"In 1955 there had been removed to the dépôt the reconditioning of chassis which had formerly been carried out at Chiswick. The defective parts were sent to Chiswick for reconditioning and after reconditioning returned to the dépôt.

"Chassis reconditioned at the dépôt have defective parts replaced from the store to which the reconditioned parts are returned."

It will be observed, my Lords, that, in the boards and blinds shop and in the plant shop, a certain amount of manufacture is carried on, but it was common ground between the parties that this manufacture was on such a small scale, compared with the other work carried on at the dépôt, that it should be disregarded by the application of the rule *de minimis non curat lex*. Thus, your Lordships can approach the first of the two questions already staged on the footing that either the whole of the dépôt is used for the maintenance of the appellants' road vehicles, or no part thereof is so used.

Counsel for the appellants submitted that the word "maintenance" should be given a narrow meaning in s. 3 (2) (b) of the Act of 1928, and referred your Lordships to s. 151 (1) (vi) of the Factories Act, 1937. He did not, of course, submit that this section could be used for the purpose of construing the Act of 1928, but he did submit that the operations of "cleaning, washing, running repairs or minor adjustments" set out in para. (vi) of that sub-section, with the addition of "oiling and greasing", were the operations covered by the word "maintenance" in s. 3 (2) (b) of the Act of 1928.

My Lords, I cannot find any context which supports this argument, either in the Act of 1928 as a whole or in s. 3 thereof. Moreover, I can find no support for the argument in any of the cases to which reference was made at the hearing. The word "maintenance" is an English word in ordinary use, having no technical meaning, and its meaning in s. 3 (2) (b) of the Act of 1928 was considered by this House in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1), and by the Lands Valuation Appeal Court in *Scottish Motor Traction Co. v. Edinburgh Assessor* (2). In the former case, this House decided that work done on the hereditament then in question (except as to one part thereof used as a paint shop) went beyond user for the maintenance of the vehicles of the Potteries company. It is, however, clear from the speeches of LORD BUCKMASTER and other noble and learned lords that the decision was based on the fact that spare parts were manufactured on a large scale on the premises. LORD BUCKMASTER said:

"It is said that these hereditaments are used for maintenance of the road vehicles, and accordingly that they are disentitled to the benefit of the statute. I find myself unable to accept this view having regard to the findings in the Special Case. The fact that spare parts are necessary for repairing omnibuses does not, in my opinion, make the manufacture of the spare parts a maintenance of the omnibus within the meaning of the statute. The processes carried out are distinctly held in the Special Case to be processes that are additional to ordinary maintenance. I think the word maintenance is a word sufficiently well known in this connexion to entitle us to rely upon the special finding of the fact in the Case. The finding that the work done in the manufacture of all the various articles specified,

(1) 95 J.P. 64; [1931] A.C. 151.

(2) 1931 S.C. 416.

every one of which, as found in the Case, would have to be purchased by the appellants, if not made upon their own premises, shows that in substance the work carried on is the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses. But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance . . . There is, however, one part of the building that is specially used for a purpose that obviously may be that of maintenance. It is that part which is devoted to the painting of omnibuses. It was urged by the appellants that there was nothing to show how much of this painting was done by way of repair and how much is original work, but in the workshops of an omnibus company owning a fleet of 198 omnibuses there must be constant repainting required, and I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief."

The last passage makes it clear that LORD BUCKMASTER regarded the word "maintenance", as used in s. 3 (2) (b) of the Act of 1928, as including work of repair.

In the *Scottish Motor Traction* case (1), the Lands Valuation Appeal Court (LORDS HUNTER, SANDS and FLEMING) upheld the decision of the Valuation Committee that the use of certain premises for "repairing, overhauling, and reconditioning the chassis and bodies of the appellants' buses" (to quote LORD HUNTER, was a use for the maintenance of the appellant's road vehicles within the meaning of s. 3 (2) (b). The Appeal Court delayed giving judgment until the *Potteries* case (2) had been decided and reported, and LORD SANDS observed:

"The premises are used for three purposes: (i) somewhat extensive offices; (ii) the repair of cars sent for that purpose by outside customers; (iii) 'repairing, overhauling, and reconditioning' the appellants' vehicles. The first is plainly a non-industrial purpose. The second is covered by the provision excluding retail shops from the benefit of the Act. The third is struck at by s. 3 (2) of the Act of 1928 as being 'maintenance' of the company's road vehicles, unless, and so far as, the repairing, overhauling, and reconditioning involve such an amount of renewal as not to be fairly described as maintenance of a vehicle."

And the same learned judge observed, in regard to other premises:

"There is nothing to show that the overhauling and reconditioning goes beyond maintenance . . ."

The relevant facts in the *Scottish Motor Traction* case (1), which has stood for twenty-seven years, strongly resemble the facts in the present case. I note that counsel for the respondent argued successfully:

"It was immaterial that the work was carried out on a very large scale.

The important point was that it was repair work, and not manufacture."

I entirely agree with that observation. In my view, the word "maintenance", in s. 3 (2) (b) of the Act of 1928, covers repairing, overhauling and reconditioning of vehicles, so long as the work does not amount to reconstruction, and so long as no manufacture of new parts is carried out on a scale to which the de minimis rule cannot be applied. If this view is correct, it may often be difficult to draw the line between "maintenance" and "reconstruction". That is a matter of fact and degree, on which different minds may arrive at different conclusions: see per LORD FLEMING in the *Scottish Motor Traction* case (1).

(1) 1931 S.C. 416.

(2) 95 J.P. 64; [1931] A.C. 151.

In the course of argument reference was made to the decisions in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (1), and *Re Charlton Works* (2). I see no reason to doubt the correctness of each of these decisions on the particular facts of the respective cases, but I cannot accept the passage in the judgment of CHARLES, J., in the former case where he contrasts "maintenance" with "overhaul". In my view, the words "maintenance" and "overhaul" are not mutually exclusive.

In the present case, the view of the tribunal was expressed as follows:

"As in all questions of degree it is not easy to say on which side of the line a certain process may be said to fall but after a careful consideration of the evidence in the light of the view which I had of the dépôt on Sept. 19, I have arrived at the decision that the processes carried out at the dépôt can properly be described as the maintenance of vehicles. It is, I think, material that at the material dates, no manufacture of new parts other than destination blinds was taking place at the dépôt. The work done at the depot was work necessary to maintain the vehicles as a fleet in running condition, and the fact that, in order to carry out the work more expeditiously and efficiently, reconditioned parts were substituted in place of reconditioning and replacing the defective parts actually removed cannot in my view change what is in fact a repair into a reconstruction. Nor I think can the fact that, instead of dealing with each dented plate or mud-guard as the damage occurs, such repairs are carried out to a programme, alter the essential character of the work. Looking at each of the individual processes they seem to me to fall clearly within what, if one was dealing with a single vehicle, might properly be called maintenance, and I do not think that because they are done collectively to a fleet of vehicles they can be said to lose this character."

I cannot find any error of law in the decision of the tribunal on this point and, reading the decision as a whole, I cannot find that the tribunal misconstrued the word "maintenance" as it is used in s. 3 (2) (b) of the Act of 1928. I agree with the conclusion of the Court of Appeal, as expressed by the Master of the Rolls (LORD EVERSHED):

"Taking the matter as a whole, viewing it broadly and in the light of the whole evidence, it seems to me impossible to say that the conclusion which the tribunal reached was not a reasonable conclusion justified by the language of the section."

For these reasons, my Lords, I would uphold the decision of the tribunal that the work carried out by the appellants at the dépôt was maintenance of their road vehicles. What, then, is the effect of s. 3 (2) (b) of the Act of 1928 on the position of the appellants? As I have already said, it is common ground that no distinction can be drawn between the work carried out on different parts of this hereditament, and that the whole of the hereditament is a "factory" within the definition in s. 149 (1) of the Factory and Workshop Act, 1901. It is clear that, if only part of the hereditament had been used for the maintenance of the appellants' road vehicles, that part would "be deemed not to form part of the factory or workshop", and would thus be excluded from the benefit of de-rating, even if the part so used were as much as nine-tenths of the whole. It is, however, contended by counsel for the appellants that s. 3 (2) (b) has no application to the present case, as not a part but the whole of the "factory or workshop" is used for the maintenance of the appellants' road vehicles; thus the whole of

(1) (1933), 18 R. & I.T. 77.

(2) (1942), 13 D.R.A. 64.

the hereditament is entitled to be de-rated. Such a result may fairly be described as absurd, and I think that the words of s. 3 (2) (b) can properly be applied to a case in which the "place" used for either of the purposes mentioned in the subsection is the whole of the hereditament. I agree with the view expressed as follows by the Master of the Rolls, with the concurrence of MORRIS and PEARCE, LJJ.:

"... according to the plain sense of the language, the paragraph is, I think, saying: 'any place used for the maintenance of road vehicles notwithstanding that it is—[I paraphrase that as "even though it be"]—within the close, the confines, of a factory, still is not to be deemed part of the factory; and if it so happens that the place is the whole, then none of it forms part of the factory and the whole is excluded.' I do not say the language is wholly happy, but I cannot find such a construction to be subversive of the meaning of the words used. I think that such a reading of the paragraph gives common sense and coherence to the two sub-sections read together."

The result is, in my opinion, that the *depôt* is not an industrial hereditament within the definition in s. 3 (1) of the Act of 1928, and this appeal should be dismissed with costs.

LORD REID: My Lords, the appellants can only succeed if their Aldenham *depôt* is an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928. There is no question of apportionment in this case; either the whole hereditament is industrial or none of it is. To be an industrial hereditament, it must be occupied and used as a factory. Undoubtedly it is a factory within the meaning of the Factory and Workshop Act, 1901, but s. 3 of the Act of 1928 adopts the definition of factory in the Act of 1901 subject to limitations. I do not think that we are concerned with the limitations contained in the provisos to s. 3 (1); proviso (f) is not very easy to interpret, but it does not appear to me to have any application to this case. But the limitation contained in s. 3 (2) (b) is of crucial importance. The paragraph is in these terms:

"For the purposes of this Act—... (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

The question in this case is whether the provisions of this paragraph prevent the appellants' premises from being an industrial hereditament and, therefore, exclude de-rating. The first argument is that the paragraph cannot apply because the work carried on in these premises is not "maintenance" of the appellants' vehicles. It is said that maintenance in this context does not include repairs but only includes such minor operations as oiling, greasing, inflating tyres, and, perhaps, making adjustments and cleaning. The structure and wording of s. 3 are such that, at first sight at least, this argument is attractive.

The definition of "factory" in the Act of 1901 is such that, if what I may call factory work is done in only part of a hereditament, or of a "close or curtilage or precincts", it brings within the factory not only those areas where factory work is done but also other areas within the precincts where no factory work is done. Looking to the purposes of the Factories Acts, this is intelligible, but

looking to the purpose of the de-rating legislation, it is equally intelligible that areas where no factory work is done should not be de-rated merely because they are within the same precincts as the actual factory. What I have called factory work includes "(ii) the altering, repairing, ornamenting or finishing of any article", and these terms cannot be read in any narrow sense. If "maintenance" could be read as limited to minor operations which do not amount to altering, repairing or ornamenting vehicles, then s. 3 (2) (b) would be dealing only with places where no factory work is done, and would simply provide that such places, though technically within a factory by reason of the Act of 1901 definition, are not to be part of a factory for the purposes of the Act of 1928. But I cannot accept that argument because, in my judgment, it is not consistent with the decision of this House in *Potteries Electric Traction Co. v. Bailey (Stoke-on-Trent Revenue Officer)* (1). It has long been established practice that any decision of this House in a previous case on a question of law, such as the interpretation of a statute, shall be regarded as binding, and shall be followed, whether or not the question was adequately argued or considered, and however much your Lordships may disagree with the decision. I would not, myself, be against a modification of this strict practice, but, so long as it exists, I do not think that I am entitled to depart from it.

I have had the advantage of reading the speech about to be delivered by my noble and learned friend, LORD KEITH OF AVONHOLM. I agree with his analysis of that case and shall not add to it. But I think that that case leaves open the question whether maintenance in this context is wide enough to cover all kinds of repair, however extensive, or whether it should be limited to some particular kinds of repair. This question appears to me to depend on the proper construction of the word "maintenance" in the context of this paragraph, and that must be a pure question of law. Once it is decided that maintenance includes at least some kinds of repair, I can see no good reason for holding that any particular kind of repair is excluded. It is not suggested that maintenance in this context has any technical meaning. "Maintenance" is an ordinary word of the English language, and, if it includes doing a few repairs at one time and then a few more at another time, I do not see how the operation could cease to be maintenance if it is found convenient to do a large number of repairs at the same time. Nor do I see any proper distinction between different kinds of repairs, or between repairs which are done with simple equipment and repairs which are more conveniently done in a fully equipped workshop. But reconstruction which goes beyond producing a repaired vehicle and, in effect, produces a different vehicle may be another matter. I do not think, however, that it would be reasonable to hold that the operations in the present case go beyond repair and amount to reconstruction. It is true that, as the bodies of the vehicles dealt with are interchangeable, it is generally found convenient not to replace the same body on the same chassis. That is the only feature in the case which could, to my mind, be said to point to reconstruction, but it would not appear to me to be reasonable to attach crucial importance to this point. I am, therefore, of opinion that the facts found in this case have rightly been held to come within the scope of maintenance.

But that does not end the case. Two arguments were submitted to the effect that, even if these premises were wholly used for maintenance, they should, nevertheless, be de-rated. First it is said that the language used in para. (b) is such that it can only apply where the premises used for "housing or maintenance of his road vehicles . . ." are part of a larger hereditament, the other part being

(1) 95 J.P. 64; [1931] A.C. 151.

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used for other purposes coming within the definition of factory purposes. In the present case, the whole of the hereditament is used for repair, i.e., maintenance of the appellants' vehicles, and it is argued that it is impossible to make the language of the paragraph apply to it. If that were so it would lead to an absurd result; if a part—even ninety-five per cent.—were used for repairing vehicles, the paragraph would apply and that part would not be derated, but if the whole were so used the paragraph would not apply and it would be derated. It is, therefore, necessary to examine the language closely to see whether it is capable of being read in a way which would avoid this absurdity.

On any view, the paragraph is awkwardly drafted. The last part adopts the definition of "factory" in the Act of 1901 "save as aforesaid", and indicates that the earlier part of the paragraph is to be read into the 1901 definition so as to narrow its scope. But the earlier part of the paragraph is drafted in a form hardly appropriate for this purpose. The use of the word "notwithstanding" in the earlier part of the paragraph is important. It must, I think, have been used on the assumption that if the premises used for maintenance, etc., stood by themselves as a separate hereditament, those premises would, undoubtedly, not be entitled to de-rating. To say that certain premises shall not be de-rated (which is the effect of this paragraph read with s. 4) notwithstanding that they are within the precincts of a factory, clearly assumes that they would not be de-rated if they stood by themselves, and, although this may be going to the extreme limit of what is permissible as a matter of construction, I am prepared to hold that this paragraph covers the present case by clear implication. In a situation so confused, I attach little importance to the verbal criticism that the words used are "form part of the factory" instead of "form part of a factory".

The second argument is quite different. Take a case where para. (b) clearly applies, the premises used for maintenance being within the precincts of a factory. Then it is argued that the paragraph does not say that those premises are not to be de-rated; it merely says that they are to be excised from the factory. The premises must, then, be re-examined as a separate entity; if they are not by themselves a factory, they are not de-rated, but, if they are in themselves a factory, then they are entitled to be de-rated. And, if that is so where the premises used for maintenance are within the precincts of a factory, it must equally be so if para. (b) is held to apply to the present case. I trust that that is a fair statement of the argument. In my opinion, that argument fails because it fails to take account of s. 4. I shall not elaborate the point because it seems to me to be clear that the effect of s. 4 is not to make a separate hereditament of a part of a factory which, by reason of s. 3 (2) (b), is deemed not to form part of the factory. All that s. 4 does is to provide for the valuation of the whole original hereditament in two parts. The part affected by s. 3 (2) (b) does not get the benefit of de-rating but the rest does, and then the valuation of the two parts are added together to make the valuation of the whole original hereditament. So there is no room for a re-examination of the part affected by s. 3 (2) (b) to see whether or not it would be a factory if it stood by itself. For these reasons, I agree that this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, the operations conducted by the appellants at their Aldenham depot have been described in full by my noble and learned friend on the Woolsack. They may be described broadly as amounting to repair and overhaul of omnibus bodies, including the renovation of seat upholstery and the repainting of the bodies. The work might, indeed, be called major repair and overhaul though that, I think, does not affect the issue.

Nor does it, I think, matter that the work covers both repair due to ordinary wear and tear and repair due to major accidents. What is material is that no manufacturing operations are carried on at the dépôt, apart from the making of a negligible quantity of destination blinds, although reconditioning of defective parts removed from the omnibuses takes place.

The first point taken for the appellants was that these repair and overhaul operations did not amount to maintenance of road vehicles within the meaning of s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. Maintenance, it was said, must be confined to such operations as washing, cleaning, oiling, greasing and day-to-day minor repairs and adjustments. This was referred to as ordinary maintenance, as contrasted with maintenance that might extend to major repairs, overhaul and renovation. Much of this argument was based on language used in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (1), in this House. My Lords, there is nothing said in that case which, in my opinion, supports this contention, and there is much in the case which is against it. Apart from work done in a paint shop, to which I shall refer in a moment, it is clear that the operations carried out on the premises in that case were, in the main, manufacturing operations of a very extensive kind. It is only necessary to read the statement of facts as given in the report of the case in the Court of Appeal to realise how predominant were the manufacturing operations carried on, and how inextricably mixed with any repairs done on the premises. LORD BUCKMASTER, after explaining that, in substance, the work carried on was the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses, said:

"But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance and, as already decided, it is the purpose to which the premises are put and not the purpose to which their products are devoted that is the question to be regarded."

VISCOUNT DUNEDIN said:

"Maintenance is taken along with housing, and points, I think, to something done to the vehicle on the premises . . . The ultimate fate of the part made is to maintain the vehicle. That does not show that maintenance is done on the hereditament."

LORD WARRINGTON OF CLYFFE said:

"With one small exception there is in my opinion nothing in the detailed description of the work which is inconsistent with the general conclusion of the learned recorder"

which was that the premises were an industrial hereditament. LORD TOMLIN, after referring to the words in s. 3 (2) "any place used by the occupier for the housing or maintenance of his road vehicles or as stables", said:

"The manufacture of spare parts for use elsewhere is not in my view within the contemplation of the sub-section. The findings of fact of the learned recorder make it plain in my opinion that the premises (other than the paint shop) are not used for maintenance in the sense which I have indicated."

LORD THANKERTON concurred in the opinion of LORD BUCKMASTER. All their Lordships agreed, however, that the paint shop was used for the maintenance of vehicles as being devoted to the repair of vehicles, and should be excluded from

the industrial column of the valuation list. LORD DUNEDIN said: "it seems pretty clear that the painting shop is used for the purpose of real maintenance." LORD WARRINGTON said:

"In his [the recorder's] description of the paint shop he says it is used amongst other things for painting omnibuses, lorries and cars. This is, I think, a matter of ordinary maintenance and the paint shop should therefore have been excluded from the factory."

This would not have been so, of course, if the paint shop had been devoted wholly to the painting of omnibus bodies made on the premises. The painting would then have been incidental to, and part and parcel of, a manufacturing operation. The finding, however, in the Case was:

"The paint shop was used for painting omnibuses, lorries and cars and all new woodwork produced in the body-building and wood-working shop."

From the opinions of LORD BUCKMASTER and LORD WARRINGTON, the House appears to have proceeded on the view that the paint shop was primarily used for the repainting of the fleet of omnibuses and other vehicles.

My Lords, I have devoted some time to the view taken of the facts of that case, but it is important to notice the issue which was before the House. It was whether it was relevant to consider the purpose for which the various parts were being made. It was the case for the revenue officer that the articles were being made for the repair of the omnibuses, and that this was, therefore, maintenance. The judgment of the House was that it was what was actually done on the premises that was relevant, and that the ultimate purpose or destination of the articles made on the premises was immaterial. This is seen in the passages I have already quoted, and is summed up in one sentence from the speech of LORD BUCKMASTER:

"But the construction of an article needed to maintain differs in my opinion from what is meant by the word maintenance and, as already decided, it is the purpose to which the premises are put and not the purpose to which their products are devoted that is the question to be regarded."

My Lords, if repairs, whether major or minor, were not maintenance, it was idle to raise or to decide this issue. Making articles for repair purposes could never be maintenance if making repairs was not itself maintenance. In my opinion, there underlies all the speeches of their Lordships in that case an acceptance of the view that repairing of vehicles was maintenance. And that view, I think, became a matter of decision in their treatment of the paint shop in that case. The repainting of car and omnibus bodies cannot be treated as a matter of day-to-day maintenance. And, if not, I see no ground for excluding any other type of repair which does not result in reconstruction, or the production of a new article. This was the view also of the Lands Valuation Appeal Court in Scotland in *Scottish Motor Traction Co. v. Edinburgh Assessor* (1), given after consideration of the decision of the House of Lords in the *Potteries Electric Traction Co.'s* case (2). Two of the premises in that case were used partly for the repair, overhaul and reconditioning of the bodies of buses belonging to the occupiers of the premises and partly for similar work on motor vehicles of outsiders. So far as work was done for customers, that was held to be work in the nature of the business of a retail shop under s. 3 (1) of the Act, and, in so far as it was work on the occupier's own vehicles, to be maintenance of his vehicles under s. 3 (2). In my opinion, that case was rightly decided.

(1) 1931 S.C. 416.

(2) 95 J.P. 64; [1931] A.C. 151.

It was submitted that what was maintenance in the sense of the Act was a question of law and not a question of fact. That may be so, but, once it is decided that maintenance includes repair in the wide sense I have indicated, the question of law has been largely, if not entirely, settled, and the only question left is whether what was done is repair or amounts to something more, namely the remaking of a new article. That may, in certain cases where the facts are equivocal as between repair and reconstruction, raise questions of fact and degree which are essentially within the province of the fact finding tribunal to determine, as has been observed by the learned Master of the Rolls (LORD EVERSHED) in this case and also by LORD FLEMING in the *Scottish Motor Traction Co.* case (1). This would seem to have been the position in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (2), to which we were referred. Certain operations described there as overhaul of road vehicles were held by the assessment committee not to be maintenance. On the other hand, the committee held that repair of vehicles which consisted in remedying all kinds of specific defects was maintenance. It was only the question of the overhauling operations on which appeal was taken to the Divisional Court, and, the court treating the matter as one of fact and degree, refused to disturb the determination of the committee. There is no magic in the word "overhaul". The question is what is nature of the operations. I agree with the learned Master of the Rolls that there is no ground on which it can be said that the Lands Tribunal here was not entitled to find that the overhauling done here was maintenance.

I turn now to the other point in the case. In s. 3 (1) of the Act "industrial hereditament" is defined as

"a hereditament (not being a freight-transport hereditament) occupied and used . . . subject as hereinafter provided, as a factory or workshop . . ."

There is nothing, in my opinion, in the proviso to that sub-section which excludes the appellants' dépôt from being an industrial hereditament. But, passing to sub-s. (2) (b) of s. 3, we find that any place used by the occupier for, inter alia, the maintenance of his road vehicles, shall,

"notwithstanding that it is situate within the close, curtilage or precincts forming a factory . . . and used in connexion therewith, be deemed not to form part of the factory . . . but save as aforesaid, the expressions 'factory' . . . have . . . the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

It is said that if a hundred per cent. of a place used by the occupier as a factory is used for the maintenance of his road vehicles, this paragraph does not apply. We must find that the place used for the maintenance of road vehicles is part of a larger unit. My Lords, if ninety per cent. of a factory is to be deemed not to be part of a factory because it is used for the maintenance of the road vehicles of the occupier, I have difficulty in seeing that a place used to the extent of a hundred per cent. for the maintenance of the occupier's vehicles is a factory within the meaning of the paragraph. The matter may be put in another way. If I ask what part of this factory is used for the maintenance of the road vehicles of the occupier, and the answer is a hundred per cent., then that part is to be deemed not to form part of the factory. To answer that a hundred per cent. is not part of a whole reduces the situation, as the learned Master of the Rolls has indicated, to an absurdity. Whatever part is used for the maintenance of the occupier's

(1) 1931 S.C. 416.

(2) (1933), 18 R. & I.T. 77.

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vehicles is to be deemed not to form part of his factory. That fixes the meaning or extent of the factory in any particular case and, if the whole is so used, then none of it is to be deemed to be a factory. The point is a new one, and did not arise in the *Scottish Motor Traction Co.* case (1), because there, part of the premises was used for the repair of the vehicles of outsiders. So part was disqualified for de-rating as being business of the nature of a retail shop and part as used for maintenance of the occupier's own vehicles. It should be noted, however, that, in the *Potteries Electric Traction Co.'s* case (2), the whole of the premises would have been excluded from de-rating under s. 3 (2) (b) on the respondent's argument in that case. This would have provided a very short answer on the appeal if the contention of the appellants in the present case were sound. Though the point is novel and the circumstances that give rise to it perhaps unusual, the contentions of the appellants must, I think, for the reasons I have given, fail. If the whole is to be excised as being deemed not to form part of the appellants' factory that, in my opinion, is the end of the case. I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I have had the advantage of reading the opinion just delivered by my noble and learned friend on the Woolsack. I have nothing that I wish to add on the question whether there was an error of law in the tribunal's finding as to maintenance. I would wish to add a few words on the construction of s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. The appellants are right in their submission that the wording is related to the case where the place used for the housing or maintenance of vehicles is situated within a factory. The word "notwithstanding" is, however, I think the key to the solution of the problem. It means that a place used solely for the housing and maintenance of vehicles is a fortiori not a factory or workshop within s. 3 (1). If this had not been the intended implication of the provision the wording would have been different. It would have run:

"any place used by the occupier for the housing or maintenance of his road vehicles situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, shall be deemed not to form, etc."

I agree that the appeal should be dismissed.

LORD DENNING: My Lords, no one can doubt that this large dépôt of the appellants is a "factory". It is fully equipped with overhead cranes and machinery of all kinds. Many buses come in for overhaul and reconditioning. Every bus is taken to pieces—every part examined, repaired, reconditioned or renewed—and the parts from many different buses are reassembled to form other buses. No bus that comes out of the dépôt can be identified with one that went in. It is surprising to find that a dépôt which is so obviously a "factory" should not be regarded as an "industrial hereditament"; and I must say that I view with some suspicion an interpretation of the statute which leads to such a result. The crucial section on which it depends is s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928; but, as this refers back to the Factory and Workshop Act, 1901, it is necessary to consider that Act as well. The Factories Act, 1937, does not affect the question: see s. 159 (3) of that Act.

The best way, I think, of understanding these statutes is to take an instance which the legislature clearly had in mind, just as I said in *Escoigne Properties, Ltd. v. Inland Revenue Comrs.* (3). The most useful instance for present purposes

(1) 1931 S.C. 416.

(2) 95 J.P. 64; [1931] A.C. 151.

(3) [1958] 1 All E.R. 406.

is to take a manufacturing company which has a large main factory equipped with machinery at which it makes articles. It sends them out to its wholesale customers by its own delivery vans. It houses its vans on the premises, and has a maintenance shop in which it does ordinary maintenance so as to keep them in running order. It has a canteen for the workers in the factory, and offices, and a restaurant for the executive staff. It happens to have a small workshop in the grounds, too, where it makes different things unconnected with the main factory. The whole of the company's business is carried on in one large area enclosed by a ring fence.

In such a typical case the effect of the Factory and Workshop Act, 1901, is this:

(i) The factory building itself is, of course, a factory; and, in addition, every other building and place within the ring fence is, *prima facie*, to be regarded as part of "the factory" because it is "within the close or curtilage or precincts" of it: see s. 149 (1) (c) and *Street v. British Electricity Authority* (1). The garage for housing the motor vans is, therefore, to be regarded as part of "the factory". So is a coach-house for horse-drawn vans, and stables for the horses. The maintenance shop (in which the vans are washed, cleaned and oiled, brakes adjusted, and so forth) is likewise to be regarded as part of "the factory". So, also, is the canteen for the workers who operate the machinery in the factory: see *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (2). But none of these—the garage, coach-house, stables, maintenance shop, or canteen—would be regarded as factories in themselves. It is only because each is part of a larger factory area that each becomes part of "the factory".

(ii) The offices and restaurant for the executive staff stand, however, on a different footing. Notwithstanding that they are "within the close, curtilage or precincts", they are not to be deemed part of "the factory". The reason is because they are solely used for some purpose other than the manufacturing process, and are taken out of "the factory" by the first part of s. 149 (4): see *Thomas v. British Thomson-Houston Co., Ltd.* (3). And, of course, considered separately, they are not a factory.

(iii) The small workshop where the company makes different things is deemed not to be part of "the factory", but it is to "be deemed a separate factory" under the second part of s. 149 (4): see *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (4).

In such a typical case, the effect of the de-rating provisions of the Rating and Valuation (Apportionment) Act, 1928, is this:

(i) The whole of the enclosed area within the ring fence is to be treated for rating purposes as a single hereditament: see *Gilbert v. S. Hickinbottom & Sons, Ltd.* (5).

(ii) The whole of the hereditament is *prima facie* to be regarded as an "industrial hereditament" within s. 3 (1) of the Act of 1928. The reason is because, when you look at it as a whole—as you must—you find it is primarily occupied and used for factory purposes and not for any of the purposes in provisos (a) to (f): see *Dalziel Co-operative Society v. Motherwell & Wishaw Assessor* (6).

(iii) But in preparing the valuation list, an apportionment must be made of the

(1) [1952] 1 All E.R. 679; [1952] 2 Q.B. 399.

(2) 105 J.P. 399; [1941] 3 All E.R. 252; [1942] 1 K.B. 53.

(3) [1953] 1 All E.R. 29.

(4) 115 J.P. 237; [1951] 1 All E.R. 682; [1951] 2 K.B. 537.

(5) 120 J.P. 288; [1956] 2 All E.R. 101; [1956] 2 Q.B. 40.

(6) 1932 S.C. 413.

annual value of the hereditament so as to apportion it between the use for industrial purposes and the use for other purposes: see s. 4 (1).

(iv) In making the apportionment, the main factory building itself is to be classed as "industrial". So must every other building and place within the enclosed area unless it is, by statute, taken out of the category of a factory: see s. 4 (2) (a). The canteen for the workers is, therefore, to be classed as "industrial". But the offices and restaurant for the executive staff are to be classed as "non-industrial", because they are taken out of "the factory" by the Factory and Workshop Act, 1901. And the garage and maintenance shop are to be classed as "non-industrial", because they are taken out of "the factory" by the Act of 1928. But the small workshop is to be classed as "industrial" because it is deemed to be a separate factory under the Act of 1901.

That is how the Acts operate in a typical case. The important thing to notice is that there is one whole enclosed factory area—a single hereditament—which is bound to be classed as an "industrial hereditament", except in so far as, by statute, parts of it are to be excluded. We are here concerned with the excluding sections, and, in particular, with s. 149 (4) of the Factory and Workshop Act, 1901, and s. 3 (2) (b) of the Rating and Valuation (Apportionment) Act, 1928. A perusal of these sections shows, to my mind, quite clearly that they are both dealing with *parts* of a larger whole hereditament, and not with a whole hereditament itself. The wording of both sections is precise and definite on the point. I will set them next to one another to show how close to one another they are and italicise the material words: Section 149 (4) of the Act of 1901 says that

"Where a *place situate within the close, curtilage or precincts forming a factory or workshop* is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that *place shall not be deemed to form part of the factory or workshop for the purposes of this Act*, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop . . ."

Section 3 (2) of the Act of 1928 says that

"For the purposes of this Act— . . . (b) any *place* used by the occupier for the housing or maintenance of his road vehicles or as stables *shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connexion therewith, be deemed not to form part of the factory or workshop . . .*"

No one reading those two sections can doubt what Parliament intended. In s. 149 (4), it envisaged a place within a factory—such as the *offices* in my illustration—and enacted that, notwithstanding that those offices were within the larger whole factory area, nevertheless they were to be excluded from "the factory". In s. 3 (2) (b) it envisaged a place within a factory—such as *the garage and maintenance shop* in my illustration—and enacted that, notwithstanding that they were within the larger whole factory area and, indeed, part of "the factory" for Factory Act purposes, nevertheless they were to be excluded from "the factory" for Rating Act purposes.

I see no possible justification in either section for supposing that Parliament intended to deal with a single hereditament which was not part of a larger whole. It certainly did not do so in s. 149 (4). And likewise, in s. 3 (2) (b), which contains identical wording on the point. Section 3 (2) (b) cannot be made to apply to a single hereditament except by re-writing it—and filling in a supposed gap—so as to make it say that the place in question "shall be deemed not (here insert *to be nor*) to form part of (here strike out 'the' and put *a*) factory or workshop". No such drastic filling in of a gap—or alteration of words—is permissible to any

court unless there is no other way of making sense of it. The Master of the Rolls (LORD EVERSHED) saw the difficulty in making this rewriting, but thought that it was the only way in which absurdity could be avoided. But I would suggest that there is nothing unreasonable or absurd about the section—provided always that you construe the word “maintenance” properly. The difficulty has arisen solely because the word “maintenance” has not been properly construed.

Let me say, then, how the word “maintenance” should, in my opinion, be construed. Its meaning can be gleaned from its context. It is used in company with two associated words “housing” and “stables”; and it is to be known by its associates. *Noscitur a sociis*. The one thing in common about “housing” and “stables” is that neither of them are “factories” by themselves in any sense of the word. Each only becomes part of a “factory” by coming within an enclosed factory area. Likewise, it seems to me that a place for “maintenance” of vehicles, in s. 3 (2) (b), denotes a place which is not by itself a “factory”, but only becomes part of a factory by coming within an enclosed factory area—such as the maintenance shop in my illustration.

“Maintenance” in this section means, I think, *ordinary maintenance*. It means washing, cleaning, oiling, minor adjustments and running repairs. A garage where minor repairs of that kind are done is not, on that account, to be reckoned as a “factory” with all that that entails. Just as a kitchen of a restaurant is not to be regarded as a “factory” simply because articles are altered, ornamented or finished in it: see *Wood v. London County Council* (1); so, also, a garage is not to be regarded as a factory because ordinary maintenance is done there: see *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (2) per LORD WARRINGTON. Such is clearly the position since 1937 (see s. 151 (1) (vi) of the Act of 1937), and I see no reason to doubt that it was the same under the Act of 1901. In this respect, the Act of 1937 only declares and clarifies the law. It does not alter it. When “maintenance” is so construed, there is nothing unreasonable or absurd in the Act. Every garage which does the *ordinary maintenance* of road vehicles (as I have described it) must bear the full rates. It is on an equal footing with every other such garage. No such garage is entitled to be de-rated, no matter whether it is occupied and used by a carrier or haulage contractor (who has no factory) or by a manufacturer (who has a factory), and no matter whether it is a single hereditament or part of a larger whole. The reason is because, when occupied and used as a single hereditament, it is not a “factory” within the Factory Act; and, when it is part of a larger factory area, it is taken out of “the factory” by s. 3 (2) (b) of the Act of 1928. That, indeed, is the very object of s. 3 (2) (b). It is to see that a manufacturer (who has a factory) is not in a better position—so far as the rating of his garage is concerned—than a carrier or haulage contractor (who has no factory). If it were not for s. 3 (2) (b), the manufacturer who garages his fleet of lorries in his own works would be entitled to have his garage de-rated—which would be very unfair to the carriers and hauliers who have similar garages liable to full rates.

So much for garages. But repair shops—where major repairs are done—stand on a different footing. These are “factories” within the Factory Act. I am quite sure that Parliament did not mean to put a carrier or haulier—who has his own repair shop—in a worse position than a repairing contractor with a like shop. As I read this Act, every workshop which does major repairs to road vehicles (including overhauling and reconditioning) as distinct from ordinary maintenance—is entitled to be de-rated. (I am speaking, of course, only of workshops proper—not of those which are primarily occupied for the purposes of a “retail

(1) 105 J.P. 299; [1941] 2 All E.R. 230; [1941] 2 K.B. 232.

(2) 95 J.P. 64; [1931] A.C. 151.

shop".) Every such workshop is entitled to be de-rated, no matter whether it is occupied and used by a carrier or haulage contractor for the repair of his own vehicles, or by one company for the repair of another company's vehicles, and no matter whether it is a single hereditament or part of a larger whole. If it is a single hereditament, it is a "factory" in itself. If it is part of a larger factory area, it is, again, to be reckoned as a "factory", either as being "part" of the larger factory, or as being "deemed to be a separate factory" within the second part of s. 149 (4): see *Thorogood v. Van Den Berghs & Jurgens, Ltd.* (1). This explains the use of the words "neither to be nor to form part of a factory" in s. 4 (2) (a) of the Act of 1928. If the words "neither to be" were omitted, every workshop within a larger factory area—of such a character that it is deemed not to form part of the factory but to be a separate factory in itself—would rank as non-industrial, which would be absurd. It is significant that the words "neither to be" are inserted in s. 4 (2) (a)—and also the word "a" is used instead of "the"—whereas there is nothing of the kind in s. 3 (2) (b). This affords strong support for the construction I have put on s. 3 (2) (b), namely, that it applies only to a part of a larger whole. It is also worth noticing that the Act itself, in s. 5 (2), uses "maintenance" as different from "repair".

Thus the whole Act fits together as a consistent whole when "maintenance" is construed as I have suggested. But, if it is treated as having so wide a meaning as to include overhauling and reconditioning and major repairs (as it was treated by the Railway and Canal Commission in *Re The Charlton Works* (2), and by the Lands Valuation Court in *Scottish Motor Traction Co. v. Edinburgh Assessor* (3), you find yourself in these difficulties—(i) If you take s. 3 (2) (b) in its natural meaning you are forced into the absurdity (which the Master of the Rolls pointed out) of saying that, if a workshop doing major repairs is a single hereditament, it will be de-rated, but if it is ninety per cent. of a larger factory hereditament, it will not be de-rated. The only way of avoiding this absurdity is to write words into s. 3 (2) (b) for which there is no justification. (ii) Even if you re-write s. 3 (2) (b) in that way, you are still forced into the equal absurdity of saying that, if a workshop is used by the occupier for doing major repairs to his own vehicles, it will not be de-rated; but if it is used by him for doing major repairs to someone else's vehicles, it will be de-rated. That cannot have been intended by Parliament. It means that a haulage contractor can always get his premises de-rated by forming one company to own the vehicles and another company to occupy the workshop. De-rating should depend on the use to which the premises are put, not on the ownership of the vehicles. (iii) In any case, you give so much elasticity to the word "maintenance" that you open the door to inequality of treatment as between similar premises up and down the country. No one can be satisfied with a system of adjudication which results in the de-rating of the workshops in *Hall & Co., Ltd. v. South-East Area of Surrey Assessment Committee* (4): and in the full rating of the workshops in the *Charlton* case (2), when, in truth, no sensible distinction can be drawn on the facts.

In the result, I am clearly of opinion that the right construction of s. 3 (2) (b) is that which I have stated. But it is said that there is a decision of this House which prevents your Lordships adopting this construction, namely, the decision about the paint shop in *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)* (5). That is, to my mind, a decision on the particular

(1) 115 J.P. 237; [1951] 1 All E.R. 682; [1951] 2 K.B. 537.

(2) (1942), 13 D.R.A. 64.

(3) 1931 S.C. 416.

(4) (1933), 18 R. & I.T. 77.

(5) 95 J.P. 64; [1931] A.C. 151.

facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else. If your Lordships were to elevate that particular precedent into a binding decision on the meaning of "maintenance" you would, I believe, carry the doctrine of precedent farther than it has ever been carried before. Just take the steps in the reasoning. It goes like this: The word "maintenance" included painting in the paint shop. That shows that it goes beyond ordinary maintenance (as I have described it) and includes repairs. Hence it is wide enough to include overhauling and reconditioning—and even reassembling into different vehicles. But when it is pointed out that, if that meaning is adopted, it will lead to an absurdity in the statute—that it leaves a gap which Parliament cannot have intended—then it is said you must fill in the gap by writing into the statute words which are not there and by altering other words. At that point in the argument you come face to face, not with a particular precedent on this Act, but with a fundamental principle on all Acts, which is this—the judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so: see *Magor & St. Mellons Rural District Council v. Newport Corpn.* (1). No court is entitled to substitute its words for the words of the Act: see *Goodrich v. Paimser* (2).

It seems to me that when a particular precedent—even of your Lordships' House—comes into conflict with a fundamental principle—also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice and, on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to particular precedent at the expense of fundamental principle. Here every principle of construction requires this House to limit the word "maintenance" to ordinary maintenance and not to extend it to the vast repairs and reconditioning and re-assembling done in this dépôt. It is to my mind clearly an industrial hereditament entitled to be de-rated. I would, therefore, allow this appeal.

Appeal dismissed

Solicitors: *M. H. B. Gilmour; Solicitor of Inland Revenue.*

G.F.L.B.

(1) 115 J.P. 613; [1951] 2 All E.R. 839; [1952] A.C. 189.

(2) [1956] 2 All E.R. 176; [1957] A.C. 65.

HOUSE OF LORDS

(LORD KEITH OF AVONHOLM, LORD MACDERMOTT, LORD SOMERVELL OF HARROW,
LORD DENNING AND LORD BIRKETT)

April 28, 29, 30, May 1, June 25, 1958

TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.*
SKEGNESS URBAN DISTRICT COUNCIL

Rating—Relief—Convalescent home of friendly society—Non-profit making organization—"Main objects charitable or . . . otherwise concerned with advancement of social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 and 5 Eliz. 2, c. 9), s. 8 (1) (a).

The trustees of a registered friendly society conducted mutual insurance among the members and occupied for the purposes of the society a convalescent home. In the course of their insurance activities, the society accumulated considerable reserves in the form of investments, securities and land. By the rules of the society a person could become a member if he satisfied certain conditions, and, as a member, he was entitled to certain benefits dependent on the contributions he paid, the benefits being determined in accordance with the society's rules and calculated on an actuarial basis. The rating authority having demanded payment of rates in respect of the convalescent home, the trustees of the society claimed limitation of rates under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), on the ground that the society was an organization which was not established or conducted for profit and whose main objects were concerned with the advancement of social welfare. It was conceded that the main objects of the society were not charitable nor otherwise concerned with the advancement of religion or education within s. 8 (1) (a).

HELD: the society was not entitled to the limitation of rates claimed because, although it was not an organization established or conducted for profit within the meaning of s. 8 (1) (a) since its object was not to make profits despite the existence of very large investments, but to provide security for its members, yet there was no element of public interest and the society was only concerned with the promotion of the private interests of members admitted on a selective basis, and, therefore, the society was not an organization whose main objects were concerned with the "advancement" of social welfare within the meaning of s. 8 (1) (a).

APPEAL by the ratepayers, the trustees of the National Deposit Friendly Society, from an order of the Court of Appeal (HODSON, PARKER and ORMEROD, L.JJ.), reported 121 J.P. 567, affirming an order of the Queen's Bench Divisional Court (LORD GODDARD, C.J., CASSELS and LYNSEY, JJ.), on an appeal by the ratepayers by way of Case Stated against a rate and a demand made by the respondent rating authority, Skegness Urban District Council, in respect of a convalescent home and premises at North Parade, Skegness, belonging to the appellant.

Pennycuik, Q.C., Widgery, Q.C., and D. Barker for the appellants.

Sir Arthur Comyns Carr, Q.C., and Scholefield for the respondents.

The House took time for consideration.

June 25. The following opinions were read.

LORD KEITH OF AVONHOLM: My Lords, this appeal arises out of a demand made by the respondents on the appellants for a rate for the year beginning Apr. 1, 1956, amounting to £1,983 4s., in respect of their occupation of a convalescent home situate at Skegness. The appellants appealed to quarter sessions against that rate on the ground that they had not been allowed the relief to which they claimed they were entitled under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The rate charged in respect of the said premises for the year ending Mar. 31, 1956, was £786 10s., and the appellants claimed that no higher rate should be charged for the following year.

It will be convenient to set out the material portions of s. 8 so far as they may affect the issue between the parties:

"(1) This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; (b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field: Provided that this section shall not apply to any hereditament to which s. 7 of this Act applies, or to any hereditament occupied by an authority having, within the meaning of the Local Loans Act, 1875, power to levy a rate.

"(2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force . . ."

It is sufficient to say that the first year of the new list was the year beginning Apr. 1, 1956.

The appellants' claim is that their convalescent home is a hereditament qualified for relief under that section.

No dispute arises on the facts. As stated by the appellants, they are the owners and occupiers of a convalescent home and premises situate at North Parade, Skegness, and the respondents are the rating authority for the area in which the said premises are situate. The appellants are the trustees of a friendly society known as the National Deposit Friendly Society founded in 1868 and first registered under the Friendly Societies Acts on Aug. 27, 1872. At the material time the society consisted of some 700,000 members, and its objects are to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death. The society also contains an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The society has no proprietors or shareholders, and all subscriptions received from members or income from investments held by the society are applied to the provision of the benefits above referred to. The committee of management, divisional committees and district committees of the society are not entitled to receive any remuneration for their services, apart from travelling and subsistence allowances. The amount of each member's subscription is calculated on an actuarial basis to ensure that the income of the society is sufficient to provide the benefits prescribed by the society's rules. No dividend or share of income is paid to members, except that

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each member is entitled to interest at $2\frac{1}{2}$ per cent. per annum on the amount standing to his credit with the society in addition to the benefits so prescribed by the rules of the society. The last-named benefits are not available to anyone who is not a member of the society. The hereditament in question here is used by the society as a convalescent home for its members, the provision of accommodation in such a home being one of the benefits provided by the rules of the society.

To this statement of the appellants, it should be added that there are certain qualifications for membership, among which are the following:—In the main benefit section, members are classified according to age at admission. Certain restrictions are imposed as regards health, occupation and age. Thus, a candidate shall be in good health, of sound constitution, with no hereditary family complaint and shall not be following an occupation considered by the committee of management to be risky or injurious to health. A candidate unable to fulfil these conditions may be admitted in a class lower than that to which his age entitles him. The admission of males from forty-five to fifty years of age, and females from forty to forty-five years of age, shall be conditional on the payment by them of a premium to the sickness reserve fund.

Members may be re-classified by the committee of management in certain circumstances, among which may be noted

“upon change of employment to an occupation considered by the committee of management to be risky or injurious to health”,

and, on the application of a member, on ceasing to follow such an occupation if the member is a male not over fifty years of age or, if a female, not over forty-five years of age at the time of the application.

It is also provided by r. 96 of the society's rules:

“1. A member shall forfeit his title to any benefit other than death benefit when: (a) He shall refuse to answer satisfactorily any question respecting his health or employment put to him by an officer of the society, or shall by any wilful act prevent or delay the recovery of his health. (b) His monthly contributions are four months in arrear. (c) He is suffering from any complaint, disease, sickness or injury which he concealed at the time of his admission into the society, or which he may have contracted by profligacy, drunkenness or by any act whatsoever contrary to law.”

Regulations of a corresponding character are made for admission to the alternative benefit section.

Separate provision is also made for admission to the insurance section with a limit of £500 payable on death of a member or under an endowment insurance and of £104 a year for a pension or annuity. It is accepted, I think, by both sides that the society, subject to the restrictions of the Friendly Societies Acts, is truly a mutual insurance society. The point was taken by counsel for the appellants that it provided a form of social security within the financial reach of weekly wage earners against sickness, disablement or death. The society possesses investments amounting to over £22,000,000 in book value and over £21,000,000 in market value, as well as other assets, which result in a surplus fund of £448,066 at Dec. 31, 1955, after debiting members' balances, various reserve funds and other liabilities.

In the Case stated by quarter sessions it is found, *inter alia*:

“(D) The policy of the appellants in the investment of their accumulated funds is to choose investments which offer the highest return of income consistent with security of capital. No attempt is made to select investments with a view to capital accretion.

"(E) The income of the appellants is devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members are entitled in accordance with the said rules and the payment of expenses of management. No member receives any dividend or share of income other than interest at $2\frac{1}{2}$ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as are provided by the said rules.

"(F) So far as the questions are questions of fact (i) the appellant society is not established or conducted for profit; and (ii) apart from the welfare of individuals who subscribe, there is absent any element of advancement of the good of the community because the society's benefits are not available to anyone who is not a member."

They were of opinion (a) that the appellants were an organisation which was not established or conducted for profit; but (b) that the appellants, being concerned only with the provision of benefits for their own members, the main objects of the appellants were not concerned with the advancement of social welfare within the meaning of s. 8.

On appeal by way of Case Stated to the Divisional Court, the court (LORD GODDARD, C.J., CASSELS, J., and LYNSEY, J.) agreed that quarter sessions had come to a right decision and dismissed the appeal. On further appeal to the Court of Appeal (HODSON, PARKER and ORMEROD, L.J.J.) this decision was upheld, PARKER, L.J., giving the judgment of the court. The case now comes, with leave of the Court of Appeal, to your Lordships' House.

The contention of the appellants is that their society is not established or conducted for profit, and that it is an organisation whose main objects are concerned with the advancement of social welfare. It is common ground that it is not a charitable organisation.

Differing views have been expressed by the judges who have considered this case. LORD GODDARD, C.J., doubted whether the society was not conducted for profit, but found it unnecessary to go into that. His view was that the main object of the society was to carry on an insurance business and that that was not social welfare. LYNSEY, J., while agreeing with LORD GODDARD, thought that "social welfare" in its context with "charitable" connoted an eleemosynary idea, and that it could not be said of a body providing benefits on an actuarial basis to its members that its main purpose was of an eleemosynary effect for the purpose of the business carried on. The Court of Appeal considered that the earning of profits was purely incidental to the society's business and that it was not established or conducted for profit. As the exemption from rates was at the expense of the general body of ratepayers, it would be right, they thought, in the case of any doubt, to give the words of the provision a restricted meaning. The court thought that, unless some restriction could be implied from the contract,

"... the provision of benefits which tends directly to improve the health or conditions of life of individuals comes *prima facie* within the expression 'social welfare'."

They found such a restriction in the words "objects ... concerned with the advancement of ...", which they read as requiring the advancement of social welfare as an end in itself or for its own sake. The Court of Appeal also agreed with LORD GODDARD, C.J., that it was remarkable, if Parliament had intended friendly societies to have special treatment with regard to rates, that it should not have said so in plain terms, as in some of the taxing statutes.

My Lords, these views were canvassed very fully in the course of the hearing of this appeal. Other submissions were also put forward from one side or the other on what, in their context, the words "social welfare", or "the advancement of social welfare", or "objects concerned with the advancement of social welfare" were apt to cover. These I shall refer to later, but first I turn to the question whether the appellants' society is an organisation established or conducted for profit.

The society may, I think, quite properly be described as a mutual insurance organisation set up to provide benefits for its members in the various mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with interest and to provide a nest egg against some emergency, or contemplated event, although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages in joining with some 700,000 others to provide against such contingencies on a mutual basis and the mutual organisation does not take on the character of a profit-making organisation by the mere addition of numbers. This was, in my opinion, the ratio of the decision of this House in *New York Life Insurance Co. v. Styles* (1), which is, I think, conclusive on this point. The Court of Appeal thought that profits, or something in the nature of profits, were earned by the society for its members, but that this was purely incidental to the purpose for which the society was formed, and that it could not be said that it was established or conducted for profit. It may well be that, on change of its investments, the society on some occasions realised a capital appreciation just as on other occasions it may have suffered a capital loss. But it was not trading in its investments, and the position in the case of this mutual society does not seem to me to be different in any way from what it would be in the case of a single individual. The society holds very large investments which earn large sums of interest and rents. These are, no doubt, profits and gains for the purpose of the Income Tax Acts but, in my opinion, the existence of these investments does not make the society an organisation established or conducted for profit within s. 8 of the Act of 1955. If it were otherwise, many charitable organisations holding investments would be cut out of the benefit of the section.

The argument for the appellants on the second limb of the section is very simple. The protection afforded through the benefits provided by the society to its members is, it is said, a species of social welfare, and the objects of the society are concerned with the advancement of this type of social welfare. Reliance was placed on certain words used by LORD TUCKER in *Inland Revenue Comrs. v. Baddeley* (2), with reference to the phrase "the promotion of social well-being". This phrase, said LORD TUCKER,

"... would appear to cover many of the activities of the so-called 'welfare state', and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable."

(1) (1889), 14 App. Cas. 381.

(2) [1955] 1 All E.R. 525; [1955] A.C. 572.

Further, it was submitted that nothing turned on the introduction of the word "advancement". It meant no more than being concerned with religion, education or social welfare. For instance, any organisation is concerned with the advancement of education which is concerned with instruction or education. So the advancement of social welfare includes making people socially well, at least where it is sought to attain that end among people in the wage-earning class as here. No distinction can be made between the advancement of social welfare and the provision of the social welfare of a class. On the other side, it was said that advancement of social welfare involves the conception of an organisation for the spread of social welfare, of devotion to good works, as suggested by LORD EVERSHED, M.R., in *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (1), of some propagation or encouragement of social welfare from the outside on altruistic grounds or motivated by Good Samaritan principles.

It was pointed out and accepted by both sides that it had been the practice of rating authorities prior to the passing of the Act of 1955 to make sympathetic assessments on charitable organisations as a matter of grace and that the Local Government Act, 1948, transferred the duty of making valuations to the valuation officers of the Inland Revenue as from Apr. 1, 1956, and so deprived the local rating authorities of making sympathetic assessments in the case of charitable organisations. These sympathetic assessments had been freely made not only on charitable organisations in the strictly legal sense but on charitable organisations in the popular sense. The Valuation for Rating Act, 1953, had provided, by s. 2, that houses, private garages and private storage premises should be rated at 1939 values for the first valuation list after Mar. 31, 1956. This meant that other premises, including those of associations not being carried on for profit, would be very badly hit by the new and greatly increased valuations. Accordingly, the relief under s. 8 of the Act of 1955 was introduced. Thus, it was suggested by counsel for the appellants, this section should be given a liberal interpretation in favour of non-profit making organisations. A subsequent statute, the Rating and Valuation Act, 1957, was passed to meet the situation by giving relief in the shape of a deduction of one-fifth of the net annual value of all non-industrial hereditaments but this, in my opinion, is irrelevant on the point of the construction of the Act of 1955. The respondents, on the other hand, relied on the legislation of 1953 as supporting the view that s. 8 should be given a restricted construction, as otherwise shops and other premises that were not derated and did not come under the relief of s. 8 would be the more heavily burdened.

My Lords, the scope of s. 8 of the Act of 1955 is, in my opinion, difficult of precise definition. It would, I think, be unsafe to venture on any definition or delimitation for the purposes of the present case. The varieties of organisations to which the terms of the statute may be thought to apply are infinite and each case must, in my opinion, be considered on its own merits. Some of the suggested criteria or tests advanced by counsel for the parties may be helpful in certain cases, but I am not satisfied that they are exhaustive. If I may venture on a general observation, it is that the words "or are otherwise concerned with the advancement of religion, education or social welfare" indicate that the section is concerned with objects which are also the concern of charitable organisations but which for some reason or other may fail to come under the definition of "charitable purposes" in the strictly legal sense. Some organisations, prior to 1955, seem to have been given sympathetic assessments by rating authorities which were charitable in the popular rather than in the legal sense. On the other hand, the section shows that the objects of an organisation need not be wholly

charitable. It is sufficient if its main objects are charitable, but that leaves it open, if its main objects are not charitable in the legal sense, to say that they are concerned with the advancement of religion, education or social welfare. I attach some importance to the words "concerned with the advancement of" as did also the Court of Appeal. These words import, I think, some limitation on the words which follow. It would have been very simple otherwise to have said "are otherwise concerned with religion, education or social welfare". But, whatever width may be given to the words of s. 8 (1) of the statute, I find myself unable to hold that an organisation like that of the appellants, formed for the mutual assurance of members admitted on a selective basis, albeit described to us as members of the lower wage-earning class, can be described as an organisation whose main objects are concerned with the advancement of social welfare. The benefits provided are benefits provided by the members for themselves. The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organisation in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse cross section of the community. I would dismiss the appeal. The costs of the appeal must be borne by the appellants.

LORD MACDERMOTT: *My Lords, the appellants are the owners and occupiers of a convalescent home in Skegness in respect of which they claim to be entitled to the measure of rating relief provided by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. To make good their claim, the appellants must bring the home within the description contained in sub-s. (1) (a) of that section which reads as follows:

"any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The appellants are the trustees of the National Deposit Friendly Society. This society has been registered under the Friendly Societies Acts since 1872. It has some 700,000 members and its objects are, in the words of the appellants' written case,

"... to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members upon the ordinary chances and changes of human life such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death."

The society also has an assurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. The subscriptions received from members and the income of the society's substantial investments are applied to the provision of benefits, and the amount of each member's subscription is calculated on an actuarial basis to ensure that the society's income is enough to provide the benefits prescribed by its rules. These benefits are not available to anyone who is not a member of the society. Admission to ordinary, that is, to benefit membership, is at the discretion of the committee of management who must be satisfied regarding the age, health, character and occupation of applicants. Each member is entitled to interest at $2\frac{1}{2}$ per cent. per annum on the amount standing to his credit with the society, but, apart from that and the prescribed benefits, no dividend or share of income is payable to members. The home in question is provided by the society for its members, and the use of

it is one of the benefits referred to in the rules. Nothing, however, turns on the actual nature of this user. The society has many properties in different parts of England and, if the appellants are right in their present contentions, the relief they now claim must extend far beyond the premises they hold for convalescent purposes.

If the rated property is to come within s. 8 (1) (a) of the Act of 1955, three conditions have to be fulfilled—first, it must be a hereditament occupied for the purposes of the society; second, the society must be an organisation which is not established or conducted for profit; and third, the society's main objects must be charitable, or "otherwise concerned with the advancement of religion, education or social welfare". Of these requirements, the first is clearly satisfied. The second has been a matter of controversy throughout the litigation, but quarter sessions found, and the Court of Appeal held, that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion on it and I shall, therefore, refrain from doing so and proceed on the assumption that this condition, too, is fulfilled. Coming to the third condition, the issue is further narrowed by certain concessions which the appellants have made, namely, that the main objects of the society are neither charitable nor otherwise concerned with the advancement of religion or education, and also that the words "advancement of" apply to "education" and "social welfare" no less than to "religion". There can be no question as to the propriety of these concessions, and the point left for determination, accordingly, is whether, in law, the main objects of the society are "otherwise concerned with the advancement of ... social welfare."

My Lords, "social welfare" is, on any view, a wide and difficult expression. The Court of Appeal regarded "welfare" as denoting a "state of being well, whether in the physical, mental or material sense", and, founding on what LORD TUCKER said in *Inland Revenue Comrs. v. Baddeley* (1), respecting the phrase "the promotion of social well-being", thought that, apart from any restriction to be implied from the context,

"the provision of benefits which tends directly to improve the health or conditions of life of individuals comes *prima facie* within the expression 'social welfare'."

On consideration, I must confess to having some doubt whether that conclusion may not go too far. Though I am not sure that this expression has as yet gained a settled primary sense, I would hesitate to regard it as synonymous with "social well-being". That phrase may be employed to describe a state of comfort and plenty, but "social welfare" seems to me to savour, at present anyway, more of those needs of the community which, as a matter of social ethics, ought to be met in the attainment of some acceptable standard. It is, however, unnecessary for me to reach a decision respecting the true import of "social welfare" in this case and, in the circumstances, it is, perhaps, better not to make the attempt. Instead, I shall assume for the purposes of this opinion, and in favour of the appellants, that the expression is, in itself, apt as a comprehensive description of the society's main objects.

On this assumption, the next question is whether the context nevertheless excludes the appellants' premises from s. 8 (1) (a). I am satisfied that it does. I find it impossible to regard para. (a) as referring to two categories of main objects—the one charitable, the other not—which have no feature or quality in common. The purpose of the paragraph—to provide a basis for the relief of

certain ratepayers at the expense of others—makes some worthy attribute which will pervade both categories a likely requirement. From the language which Parliament has used, it seems to me that the paragraph provides for this and makes it necessary for every object that comes within it to have a common and commendable quality. Though the objects which constitute the second category—"the advancement of religion, education or social welfare"—are not charitable, there can be no doubt that they are akin to what is charitable and have been intentionally described as such; there is nothing in their description incompatible with charity and, if they fall outside what is charitable, it is not because they are in conflict with the legal concept of charity, but because they lack some one or more of its characteristics. But perhaps the clearest indication of a common factor is the use of the word "advancement" in the second category. It is a word which has long been associated with charitable purposes, particularly in relation to religion and education, and it stands for something of importance in what is legally charitable. Its insertion in the non-charitable category seems to me to indicate the existence of a close link between the categories and to be difficult to explain on any other basis.

The same purposeful word, in my opinion, also indicates the nature of this link. In *Re Cranston, Webb v. Oldfield* (1), FITZGIBBON, L.J., said this:

"The essential attributes of a legal charity are, in my opinion, that it shall be *unselfish*—i.e. for the benefit of other persons than the donor—that it shall be *public*, i.e. that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be *philanthropic* or *benevolent*—i.e. dictated by a desire to do good."

My Lords, what FITZGIBBON, L.J., said by way of defining the public nature of a charity may be open to review in the light of the decision of this House in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (2), but there can be no doubt that unselfishness and benevolence are still of the essence of legal charity. That is not to say, and I do not think FITZGIBBON, L.J., meant to suggest, that the unselfish element must be absolute in the sense that what would otherwise be charitable will fail to be so if its founders or promoters incidentally take some degree of benefit. The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word "advancement" as used in the paragraph in question, for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others.

If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in s. 8 (1) (a), it remains to inquire whether the objects of the society possess or lack this quality. In my opinion, they lack it. That they promote the well-being of the society's members may be taken for granted, but that is not the test. The society's benefits are provided for, and confined to, its subscribing members, and are enjoyed by them, not incidentally or by the side of some wider, dominating purpose, but because such benefits are the whole aim and object of the association for mutual benefit which the society is. It is the private interests of its own subscribing membership that the society promotes and, admirable as that may be, it cannot be considered as in any relevant sense an altruistic activity. For this reason, I am of opinion that,

(1) [1898] 1 I.R. 431.

(2) [1951] 1 All E.R. 31; [1951] A.C. 297.

whatever "social welfare" may be, the objects of the society are not concerned with its "advancement" within the meaning of s. 8 (1) (a).

I would, therefore, affirm the decision of the courts below and dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. The words used are general and I agree it would be unsafe, and I think also it would be impossible, to find some definition in other words which would be of assistance in subsequent cases. This is not one of those rare cases, as my noble and learned friend implies, in which assistance can be got from other cases in which the courts have had to construe and apply different words from those under consideration.

LORD DENNING: My Lords, in order to understand s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it is as well to know the background against which it was enacted. It is legitimate for this purpose to take notice of matters generally known to well-informed people. The background here—as both counsel agree—is that previously, in the days when the local authorities were entrusted with the task of assessing the value of properties, they used to make "sympathetic" assessments. If they thought that an organisation was deserving of some relief from the burden of rates, they used to make a very low, even a nominal, assessment of the value of its property; so that, when the rate was afterwards made by the rating authority, at so many shillings in the pound, the sum payable by the deserving organisation was very small. There was no statutory authority for this practice. It was just done and nobody objected, because it was in a good cause. By recent enactments, however, Parliament has taken away from the local authorities the task of assessing the value of properties and has entrusted it to the valuation officers of the Commissioners of Inland Revenue. These officers have to assess values on uniform standards—applicable over the whole country—without favour or sympathy for anyone. This has meant a great increase in the values placed on the properties of these deserving organisations; and, if they were called on to pay the full rate, at so many shillings in the pound, on these new assessments, they would have to pay far more than they used to do, and the effect of the sudden change on their finances might well prove disastrous. In order to help these deserving organisations over this difficulty, Parliament enacted s. 8 of the Act of 1955, which provides that for the first year they should not have to pay more than they did before, and that for the following three years at least they should only have to pay on a reduced basis. Full rates, however, will become payable if the local authority give three years' notice to that effect. Over and above this temporary assistance, Parliament, by the self-same section, has given the local authorities a permanent discretion to help these deserving organisations by reducing or remitting the rates payable by them. It is, therefore, a question of great importance to an organisation to know whether it comes within the deserving category or not. Hence the many cases now coming before the courts.

Section 8 is framed very widely, no doubt because Parliament intended that local authorities should be able to do much as they had done in the past—to give relief from rates where they considered it to be deserved; but, at the same time, Parliament did intend to lay down some limits to the organisations which could be considered deserving as otherwise there might be undue variation between one rating area and another.

In applying s. 8 (1) (a), the first thing to notice is that it covers "any hereditament occupied for the purposes" of the deserving organisation. Our present case happens to concern a convalescent home at Skegness, but the

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question for consideration would be just the same if we were considering the head office of the society in Buckingham Palace Road. If the convalescent home is entitled to statutory relief from rates, so are the commercial offices of the society.

In order to qualify for the benefit of the section, the society must be an organisation "which is not established or conducted for profit". I have no doubt that this society was not "established" for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness, medical benefit, old age pay, and money to be paid on death. Rule 2 (2) shows that, if there was any surplus due to a member—after providing for the benefits—the society was to accumulate it at interest for him. The society was, therefore, in its inception, very like a simple mutual insurance association in which a group of individuals pay premiums representing their share of the estimated "risk"; and, at the end of the year, any surplus is returned to them or applied in reduction of the next premiums. Such an association, so long as it is conducted on that basis, does not make profits: see *New York Life Insurance Co. v. Styles* (1). The basis of that decision, as I understand it, is that the surplus is returned to the contributors, or at any rate credited to them.

But has the society, in the course of its history, changed its character? Is it now "conducted for profit"? It is not a small group of individuals. It has 700,000 members. Although it is not an incorporated body, it is a legal entity—or, at any rate, so like one that I doubt whether anyone can tell the difference: see *London-Griffiths v. Smith* (2), *Bonsor v. Musicians' Union* (3). The largest section of its undertaking is the deposit section, which is conducted in this way: the members pay contributions to the society, out of which it pays the sickness and other benefits. Any surplus is credited to the members' deposit accounts. But many members, in addition to their contributions, often make direct payments into their deposit accounts. These direct payments amount in all to very large sums. The deposit accounts carry interest at $2\frac{1}{2}$ per cent. and can be withdrawn on notice. The society invests the contributions and deposits in authorised investments. In making these investments, the policy of the society

"is to choose investments which offer the highest return of income consistent with security of capital . . . No member receives any dividend or share of income other than interest at $2\frac{1}{2}$ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as are provided by the said rules."

And it is to be noticed that the society does not have to pay any income tax: see s. 440 (1) of the Income Tax Act, 1952.

This policy of the society has yielded impressive results. The members' balances (representing the money due to them by the society, including accrued interest) stand at some £14 million. But the society's investments stand at some £22 million (which bring in an income of £880,000 a year). The society has, therefore, the very substantial reserve of some £8 million. This reserve is credited in the accounts, as to some £5½ million to the sickness reserve fund, and some £2½ million to the death benefit fund. It may well be asked: How has this vast

(1) (1889), 14 App. Cas. 381.

(2) [1950] 2 All E.R. 662; [1951] 1 K.B. 295.

(3) [1955] 3 All E.R. 518; [1956] A.C. 104.

reserve accumulated unless it be from profits made by the society on its investments? It does not require much imagination to suggest that it has received four per cent. or five per cent. on its investments (free of tax) and paid out only $2\frac{1}{2}$ per cent. to its members. This is a far cry from a simple mutual insurance association which, in fact, returns any surplus to its members. It is far removed, too, from the complicated mutual insurance corporations of today which in theory—but not in reality—return surpluses to contributors: see *Faulconbridge v. National Employers' Mutual General Insurance Assocn., Ltd.* (1), and the Report of the Royal Commission on Taxation of Profits, para. 589, para. 590. None of those mutual associations has anything corresponding to the deposit section of this society.

Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is "conducted for profit", which I take to mean "conducted for the purpose of making profit". Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here, it seems to me, that, if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit: see *R. v. Whitmarsh* (2), *Bear v. Bromley* (3). Applied to this case, I think that the building up of a reserve fund—despite its size—is not one of the main objects of this society. It is only incidental—a consequence of the wise investment policy it has pursued. The main object of the society is to provide security for people of small means against the risks which life holds for them—and not to make a profit therefrom. It is, therefore, not conducted for profit.

The next thing that is necessary, in order to enable the society to qualify for the benefits of s. 8, is that its

"main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It is quite plain that, by those words, Parliament intended to extend the benefit of the section beyond the field of legal "charities". In law, "charitable" is a term of art with a technical meaning which is narrower than its popular meaning. In this section, Parliament intended to expand the technical meaning so as to embrace a wider group of deserving organisations. Thus Parliament does not limit the organisations to those whose objects are "exclusively" or "only" of a particular character, as it has done in some statutes. It is sufficient if the "main objects" of the organisation—which I take to mean all of its main objects as distinct from its subsidiary objects—are of that character. For instance, a scientific institute would qualify for the benefit of the section if its main object was the advancement of education even though it had, as a subsidiary object, the purposes of its members. But, in order to ascertain the "main objects" of an organisation, you are entitled, I think, not only to look at its rules but also to

(1) (1952), 33 Tax Cas. 103.

(2) (1850), 15 Q.B. 600.

(3) (1852), 16 J.P. 710; 18 Q.B. 271.

consider the way in which it has conducted its affairs. If you should find, for instance, that a scientific institute—which was formed primarily for the promotion of science—has been so conducted that the advancement of the interests of its members has become one of its main purposes—as distinct from being merely subsidiary to the advancement of education—then it would cease to qualify for the benefits of the section: see *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (1), per LORD REID). Again, Parliament does not limit the benefit to those organisations whose main objects are “charitable”. It extends the benefit to those whose main objects are “otherwise concerned with the advancement of religion, education or social welfare”. This is a considerable extension on “charities”, but is it an unlimited extension?

The principal question in this case, it seems to me, is whether, in order to obtain the benefit of the section, the main objects of the organisation must be directed to the public benefit rather than to the private benefit of the individuals who make up the organisation. Counsel for the appellants argued that the words were so wide as to eliminate any necessity for public benefit. He laid stress on the words “or otherwise”. He pointed to the words “the advancement of religion, education” in the section, and said that trusts for those purposes are “charitable” if they are directed to the public benefit. If the words “or otherwise” are to be given any effect, he said, in regard to religion and education—over and above “charitable”—they must bring in organisations which are not directed to the public benefit. I cannot agree with this contention. I think the words “charitable or otherwise” give a colour, so to speak, to all the words that follow after them. The section cannot be read as if those words were left out—as if the only question were whether the main objects are “concerned with the advancement of religion, education or social welfare”. The main objects which are “otherwise” concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects. That is how LORD BUCKMASTER approached a similar problem in *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd.* (2), and I would approach this problem in the same way.

What, then, are the ways in which the main objects must be akin to charitable objects? The one thing that distinguishes charitable objects from all others is that they are for the good of the community, that is, for public rather than for private benefit; and, in order to qualify an organisation for the relief given by the section, there must be present, I think, the concept of public benefit—wider, no doubt, than the somewhat limited interpretation put on it in the charity cases—but, still, it must be present. For this purpose, the main objects must be altruistic—must be concerned with doing good for others rather than for yourself—for others, that is, who are outside your own circle of relatives and friends and to whom you are under no personal obligation. There is no need under this section to canvass the cases on what constitutes a section of the community for “charitable” purposes, such as *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3) and *Inland Revenue Comrs. v. Baddeley* (4), in which there was a divergence of opinion among the judges. Suffice it to reach a conclusion on a general survey of the circumstances.

I am confirmed in this view by the other words in the section. Take the word “advancement”, as used in the phrase “advancement of education”? The word “advancement” connotes, to my mind, the concept of public benefit.

(1) [1952] 1 All E.R. 984; [1952] A.C. 631.

(2) [1932] A.C. 328.

(3) [1951] 1 All E.R. 31; [1951] A.C. 297.

(4) [1955] 1 All E.R. 525; [1955] A.C. 572.

When a man teaches his own children their lessons, he is not concerned with the "advancement of education" but solely with the "education" of his children. But when a schoolmaster teaches the boys in a public school, he is concerned—with their education truly—but also with the "advancement of education" generally. I would not, myself, confine the "advancement of education" to the advancement of education as an end in itself or for its own sake—if that means the advancement of the theory of education as taught in a training college for teachers—or even if it means the advancement of mind training. "Education" means, I think, simply the educating of people either in general subjects or in particular subjects. But the "advancement" of education connotes public, as distinct from private, benefit. Likewise the "advancement of religion" connotes the promotion of religion by spiritual teaching or by pastoral or missionary work among others outside one's own circle. When a man says his prayers in the privacy of his bedroom, he may truly be said to be concerned with religion but not with the "advancement of religion".

The words "social welfare" themselves also connote, to my mind, the concept of public benefit. These words comprehend many objects which are beneficial to the community but are not charitable according to the somewhat limited interpretation given in the charity cases. A person is commonly said to be engaged in "social welfare" when he is engaged in doing good for others who are in need—in the sense that he does it, not for personal or private reasons—not because they are relatives or friends of his—but because they are members of the community or of a portion of it who need help. The need may not be due to poverty. It may be due to the conditions of life of the persons concerned. They are usually people who are under a disadvantage compared to others more favourably placed—boys who need a youth club instead of running on the streets—people of small means who are given holidays in a home which they could not otherwise afford—working men who need a club where they can spend their leisure—and so forth. If a person is engaged in improving the conditions of life of others who are so placed as to be in need, he is engaged in "social welfare". But people who are engaged in improving their own conditions of life are not engaged in social welfare. If an organisation is formed by public-spirited folk with the object of providing a boys' club—or a room for a women's institute—it is, no doubt, concerned with the advancement of social welfare; but, if it is formed by a group of persons with the object of providing a social club for their own enjoyment or recreation, it is not. The difference between the two is that the main objects of the one are directed to the public benefit whereas the others are not.

The Court of Appeal seem to have derived some help by writing, as it were, into the section, after the words "social welfare", the phrase "as an end in itself or for its own sake". I find no special virtue in this phrase. It has for me no clear meaning. But, if and in so far as it brings in the concept of public benefit, it brings into play the very distinction which is, I think, implied throughout the section.

It is this distinction which gives the clue to the deciding of the present case. I agree with counsel for the appellants that the main objects of this society are directed to social security—in the sense that the purpose is to enable people of small means to secure themselves against the risks which life holds for them—nevertheless I cannot see in its objects any element of public benefit. The purpose is that each member should provide for his own security—by means of his contributions and deposits—just as other people do by insurance. No member is concerned with doing good for others. Each one is concerned with doing good for himself and his family. And the society exists so as to enable each member

to do just that very thing. I entirely agree with all the judges in the courts below in holding that this is not charitable or otherwise concerned with the advancement of social welfare. I would, therefore, dismiss this appeal.

LORD BIRKETT: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack. In my opinion, the special facts are decisive of the two main points raised in this appeal, and show that the appellants' organisation is not established or conducted for profit, and that its main objects do not fall within the proper construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

Appeal dismissed.

Solicitors: Woolley, Tyler & Bury; Wrentmore & Son.

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., CASSELS AND DIPLOCK, J.J.)

May 14, 1958

R. v. MARLEY

Criminal Law—Evidence—Statutory declaration—Goods stolen when in possession of British Transport Commission—Proof of dispatch—Form of declaration—Need for statement that goods were handed to Commission by declarant or by some person—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 41 (3).

Where it is desired to prove by means of a statutory declaration under s. 41 (3) of the Criminal Justice Act, 1948, the dispatch of goods alleged to have been stolen when in the possession of the British Transport Commission, it is not sufficient that the deponent should state that the goods were parcelled, addressed and labelled by him or in his presence and that "the goods were handed to the Commission". If the declarant can do so, he should state that the goods were handed to the Commission by him or by some person in his presence; if he cannot, the person who actually handed the goods to the Commission must also make a declaration.

APPEAL against conviction.

The appellant was convicted at Surrey Quarter Sessions on Feb. 12, 1958, of larceny of goods in the possession of the British Transport Commission and was sentenced to eighteen months' imprisonment.

A variety of goods had been packed and sent off by different firms in Nottingham to addresses in Surrey, and in the ordinary course of transport were in the possession of the British Transport Commission at Bricklayers' Arms goods station. They were stolen by the appellant therefrom. To prove dispatch and non-receipt of the goods the British Transport Commission police prepared a number of statutory declarations, which were practically word for word the same in all material parts. The declarations were made by the packers and in all cases but one were in the following form: "On . . . I packed into a parcel . . . This parcel was addressed by means of a . . . label to . . . It was handed to British Railways the same day for conveyance by rail to destination". In the remaining case the words "I handed" appeared instead of the words "it was handed". At the trial objection was taken to the admissibility of the declarations in evidence, but, after hearing argument in the absence of the jury, the Deputy Chairman ruled that they were admissible.

Langdon for the appellant.

Corkrey for the Crown.

The judgment of the court was delivered by

LORD GODDARD, C.J.: The only real point in the case is one taken by counsel for the appellant on which it is necessary for the court to say a word,

because it deals for the first time with a most useful provision in the Criminal Justice Act, 1948, to prevent the necessity of having to call witnesses from all over the country to trace goods which have been stolen in the course of transit or at the place of destination.

Section 41 (3) provides:

"In any proceedings for an offence consisting of the stealing of goods in the possession of the British Transport Commission or any executive (other than the Hotel Executive) constituted under s. 5 of the Transport Act, 1947, or of receiving goods so stolen knowing them to have been stolen, or for an offence under s. 12 or s. 18 or s. 33 (2) of the Larceny Act, 1916, or ss. 50 to 56 of the Post Office Act, 1908 [see now Post Office Act, 1953, ss. 52-58], a statutory declaration made by any person (a) that he dispatched or received or failed to receive any goods or postal packet or that any goods or postal packet when dispatched or received by him were in a particular state or condition; or (b) that a vessel, vehicle or aircraft was at any time employed by or under the Post Office for the transmission of postal packets under contract, shall be admissible as evidence of the facts stated in the declaration."

In this case most of the statutory declarations are in the same handwriting and are practically word for word the same in all material parts and have obviously been, quite properly, prepared by the railway police. The persons who make the declarations are, for the most part, packers who prove the preparation of the parcels, which is part of the dispatching. They describe the packing up, the addressing and labelling of the parcel and set out in each case its contents and value. Then they say that the parcel was handed to the British Transport Commission for conveyance. In one case the declarant says: "I handed it". If he handed it, that is all right, but otherwise either the declarant ought to say: "I saw it handed to the British Transport Commission" or the person who actually handed it to the Commission ought also to make a declaration. One might say that that is almost an unnecessary formality because the parcel is packed for dispatch. It is proved to have got into the possession of the British Transport Commission, because a representative of the Commission gives evidence, as in this case, that the parcel was collected at the station. Where, however, evidence by statutory declarations instead of oral evidence in court is allowed to be given, it is most important that there should be compliance with the exact terms of the statute. Therefore, the proper course would be for somebody to declare of his knowledge that the goods were handed either by him or by some person in his presence to the British Transport Commission.

There is, therefore, a hiatus in these statutory declarations, but it is not a hiatus which the court will allow to set aside a very proper conviction for an extremely clever theft. We shall apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, which allows the court to decide the appeal in favour of the appellant, but nevertheless to dismiss the appeal if they consider that no substantial miscarriage of justice has occurred. Nobody could have any doubt that no substantial miscarriage of justice has occurred or that the appellant was a party to the stealing of the goods which were in the possession of the British Transport Commission. I have said what I have with the assent of the other members of the court, so that the Commission may see in future that the statutory declarations quite clearly state that the goods were handed by the declarant or by some person in his presence to the Commission. Therefore, we apply the proviso in this case, and dismiss the appeal.

Appeal dismissed.

Solicitors: *The Registrar, Court of Criminal Appeal; Solicitor, British Transport Commission (for the Crown).*

T.R.F.B.

CHANCERY DIVISION

(DANCKWERTS, J.)

June 27, 1958

RIGDEN v. WHITSTABLE URBAN DISTRICT COUNCIL

Town and Country Planning—Enforcement notice—Validity of notice—Application by originating summons for declaration that notice invalid—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 23 (2), (3)—R.S.C., Ord. 54a, r. 1, r. 1a.

An enforcement notice served on the occupier of land under s. 23 (1) of the Town and Country Planning Act, 1947, required him to take the following steps (to restore the land to agricultural land) on or before Nov. 7, 1957, namely, the discontinuance of the use of the land as a caravan park and caravan camp by the removal of all caravans in excess of two in number, such number to include one caravan stationed within the curtilage of the dwelling-house. It was stated that the notice was to take effect on Oct. 31, 1957. The occupier contended that the notice failed to comply with s. 23 (2) and (3) of the Act of 1947, and applied by summons under R.S.C., Ord. 54A, r. 1, for a declaration that the notice was void and of no effect.

HELD: in claiming that the notice was invalid as not complying with the Act of 1947, the occupier was not a person "interested under a . . . written instrument" within R.S.C., Ord. 54A, r. 1, nor "claiming [a] legal or equitable right" which depended on the construction of a statute within R.S.C., Ord. 54A, r. 1A, and accordingly, the validity of the enforcement notice could not be determined by summons.

ADJOURNED SUMMONS.

The plaintiff, George Rigden, applied by originating summons for a declaration that an enforcement notice dated Oct. 31, 1957, in respect of land of which he was owner and occupier at Whitstable in the county of Kent, purporting to be made by the Whitstable Urban District Council under powers delegated to them by the Kent County Council (with the consent of the Minister of Housing and Local Government) and purporting to be made under the Town and Country Planning Act, 1947, failed to comply with the provisions of s. 23 of the Act and was accordingly null and void and of no effect whatever. The relevant part of the enforcement notice appears in the judgment.

Layfield for the plaintiff.

Denys B. Buckley for the council.

DANCKWERTS, J.: This is an application by Mr. George Rigden against the Whitstable Urban District Council by originating summons under the provisions of R.S.C., Ord. 54A. The defendants, the Whitstable Urban District Council, are the planning authority for the relevant district by virtue of the Kent County Council having delegated their power; and the plaintiff is the owner of property known as "Limerlost", Church Lane, Seasalter, Whitstable, in the County of Kent, on which apparently he has been keeping caravans, using the land as a winter caravan park and a summer caravan camping site. The Whitstable council has objected to this, and the question which is raised by this summons is in regard to an enforcement notice served by the Whitstable council under the provisions of the Town and Country Planning Act, 1947.

The powers of the planning authority (the council) are conferred by s. 12 (1) of the Act of 1947, which requires permission to be obtained, in effect, for any development of land which is carried out after the appointed day, which is July 1, 1948. Development is defined in s. 12 (2) as follows:

"...except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or

other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

It is with regard to the use of the land that the objection has been raised.

The provisions for an enforcement notice are contained in s. 23 and s. 24 of the Act. Section 23 (1) allows the planning authority to serve an enforcement notice within four years of the development being carried out, and s. 23 (2) and s. 23 (3) contain provisions as to the form of such a notice. Section 23 (2) provides:

"Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

Section 23 (3) provides:

"Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein . . ."

The proviso to s. 23 (3) causes a suspension of the effective notice when there is an appeal pending the final determination of the appeal. Section 23 (4) provides for an appeal to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated, and then states what the court may do on such an appeal. Section 23 (5) provides for a further appeal to a court of quarter sessions.

The notice in the present case was dated Sept. 27, 1957, and required the plaintiff "to take the following steps for the aforesaid purpose", viz., for restoring the aforementioned land to the condition (as agricultural land) in which it was before the development took place,

"on or before Nov. 7, 1957, namely the discontinuance of the use of the land as a caravan park and caravan camp by the removal from the land of all caravans in excess of two in number such number to include one caravan stationed within the curtilage of the dwelling-house."

Then there is a statement: "This notice will take effect on Oct. 31, 1957".

It is contended that that notice is bad because it takes no account of the fact that the period within which the notice would take effect might be suspended if there were an appeal against the notice, and in that event the period within which the land was required to be restored by the notice would have expired before the period within which the notice takes effect had come to an end. The object of this application is to obtain a declaration from the court that that notice fails to comply with the provisions of s. 23 of the Act and is accordingly null and void and of no effect whatever. It is claimed that the validity of the notice cannot be decided by the court of summary jurisdiction, or the court of quarter sessions on an appeal against the notice: see *Mead v. Plumtree* (1), per LORD GODDARD, C.J.; and so it is contended that the present application is

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a convenient and appropriate method of obtaining a decision on the validity of the notice. The owner of the land naturally wants to know his position in relation to s. 23 of the Act.

R.S.C., Ord. 54A, r. 1, provides:

"In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

Rule 1A provides:

"In any Division of the High Court any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

I have come, with some reluctance, to the conclusion that the plaintiff cannot bring himself within the terms of either of those rules. It is perfectly true that he is interested in the question of the validity of the notice, and it may be true that the question of the validity of the notice depends on the proper construction of the statute, but this is a very restricted jurisdiction conferred by R.S.C., Ord. 54A, and if the application does not fall within the terms of the rules, I have no power, whatever I would like to do, to consider it. I do not think that the plaintiff can be said to be a person "interested under a deed, will, or other written instrument" within the meaning of r. 1. He cannot really be interested under a notice; he is merely interested in trying to show that the notice is invalid and does not comply with the Act. Again, with regard to r. 1A, he is not "claiming any legal or equitable right", which depends on a question of the construction of the statute. There might be a question depending on the true interpretation of s. 12 of the Act and the exercise by the planning authority of its powers conferred by the Act; but a claim to a legal or equitable right depending on the construction of a statute cannot be said to be raised by a question as to the validity of an enforcement notice served by the planning authority for the purpose of securing compliance with its order because of the failure of the landowner to obtain the necessary permission. It does not seem to me that the plaintiff is claiming any legal or equitable right which depends on the notice, and therefore I have most reluctantly come to the conclusion that I am not in a position to entertain this application, and it must be dismissed.

Summons dismissed.

Solicitors: Balderston, Warren & Co., for Wild & Son, Whitstable, Kent;
 Sharpe, Pritchard & Co., for R. H. Kealy, Whitstable, Kent.

R.D.H.O.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SLADE AND DEVLIN, JJ.)

July 2, 1958

STONE v. BOREHAM

Shop—Sunday trading—Mobile van equipped as shop—Sale of goods in street—Portion of street where van stopped not a "place" where business carried on—Shops Act, 1950 (14 Geo. 6, c. 28), s. 47, s. 58, s. 74 (1).

The respondent owned a motor van which was equipped as a mobile shop and was stocked with a variety of goods. On a Sunday, in the course of his usual round, he stopped the van in a street and sold to a customer who was standing in the roadway a packet of tea. Justices dismissed an information charging the respondent that, being the person then carrying on retail trade at a certain place, namely, the portion of the street where he stopped his van, he did not close that place for the serving of customers on the Sunday, in that he there sold a packet of tea, contrary to s. 47 and s. 58 of the Shops Act, 1950. By s. 74 (1) of the Act "shop" is defined as including any premises where any retail trade or business is carried on, and, by s. 58, the provisions with regard to Sunday closing are extended to "any place where any retail trade or business is carried on as if that place were a shop."

HELD, that a mobile travelling van from which sales are made is not a "shop" within s. 74 (1); that the portion of the street where the respondent stopped his van did not become a "place" where the respondent was carrying on a retail trade or business within s. 58 merely because the respondent had stopped there to make a sale; and that the justices were, therefore, right in dismissing the information.

CASE STATED by justices for the county of East Suffolk.

On Dec. 23, 1957, an information was preferred by Oswald John Stone, the appellant, a Shops Act inspector, against Keith Ramon Boreham, the respondent, alleging that the respondent, on Nov. 10, 1957, at Woodbridge, being the person then carrying on retail trade at a certain place, viz., outside No. 106, Peterhouse Crescent, Woodbridge, did not close that place for the serving of customers on Nov. 10, which was a Sunday, in that he sold a packet of tea at the above place contrary to s. 47 and s. 58 of the Shops Act, 1950. The information was heard at Woodbridge Magistrates' Court on Jan. 9, 1958, when the following facts were found by the justices.

The appellant was at all material times a Shops Act inspector, appointed by East Suffolk County Council, and was duly authorised to institute proceedings on behalf of the county council for offences against the Shops Act, 1950. The respondent was the owner of an Austin motor van which was equipped as a mobile shop and was stocked with a variety of goods, including groceries and ice cream, for sale by retail by the respondent to the public. On Sunday, Nov. 10, 1957, in the course of his trade or business, the respondent drove the van slowly along Peterhouse Crescent, which was part of his normal Sunday round with the van, advertising its presence by musical chimes and stopping the van at frequent intervals, and at 4.30 p.m., he stopped the van in the roadway outside No. 106, Peterhouse Crescent and, there, sold to a customer who was standing in the roadway, a packet of tea. The respondent said that he did not think that the provisions of the Shops Act applied to mobile vans.

For the appellant it was contended that the portion of Peterhouse Crescent on which the respondent's van was standing at the time when he sold the tea was a "place" within the meaning of s. 58 of the Shops Act, 1950; that the respondent was carrying on a retail trade or business at that place and that the respondent was therefore guilty of the offence charged in the information. For the respondent it was contended that the portion of Peterhouse Crescent occupied by the stationary van was not a place within s. 58; that the sale was effected

in the van, not in the roadway, and that the van was not a place within s. 58; that the van was mobile and at no time occupied any identifiable place within the meaning of s. 58 and that the respondent was, therefore, not guilty of the offence charged. The justices were referred to *Eldorado Ice Cream Co., Ltd. v. Clark* (1) and were of the opinion, having regard to that decision, that a place within the meaning of s. 58 of the Act of 1950 must be premises akin to a shop, while the offence alleged here was that retail trade or business was carried on on an undefined portion of the public highway which place was not closed for the serving of customers on a Sunday. In view of the decision cited, it was not alleged that the mobile van, while stationary, was a place within s. 58. On the facts found, the justices were, therefore, of opinion that the charge contained in the information could not be sustained. The appellant appealed.

The question for the court was whether or not a sale was effected at a place where the respondent was carrying on a retail trade or business within the meaning of s. 58 of the Act of 1950.

Boreham and *M. Dyer* for the appellant.

Crespi for the respondent.

LORD GODDARD, C.J., having referred to the Case Stated and the information preferred against the respondent, continued: The information, stating it shortly, charges the respondent with having sold a packet of tea on a Sunday contrary to s. 47 and s. 58 of the Shops Act, 1950. The matter came before a lay bench of justices at Woodbridge; I pay tribute to the care that they gave to the case, and I have come to the conclusion that their decision was right. [His LORDSHIP then stated the decision of the justices, as set out in the Case Stated, and continued:] The sale took place from one of the large mobile lorries or vans which nowadays are becoming common about the country, called mobile shops, and I have no doubt that as the Shops Act, 1950, was intended to prohibit and regulate Sunday trading, it might be a very good thing from the public point of view, though it is not for us to express opinions on matters of policy, if these mobile vans came within the Act. It certainly seems, if they do not, that there is unfair competition. The shopkeeper has to close his shop, but the owner of a mobile van can go round and sell from his van. However, we have to see whether on the construction of the Act of 1950 and the cases which are binding on this court an offence has been committed.

The various Shops Acts are consolidated in the Shops Act, 1950, and that is the Act to which we have to pay attention, though one case, *Eldorado Ice Cream Co., Ltd. v. Clark* (1), on which the justices relied, was decided under one of the earlier Acts which is consolidated with and reproduced in the Act of 1950. Section 47 of the Act of 1950 provides:

"Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday."

Section 74, which is the definition section, says: "'shop' includes any premises where any retail trade or business is carried on". That is not a precise definition; it includes any premises where any retail trade or business is carried on and does not therefore exclude other matters. Section 58 provides:

"The foregoing provisions of [Part IV] of this Act except [sections to which I need not refer] shall extend to any place where any retail trade or business is carried on as if that place were a shop, and as if in relation to any such place the person by whom the retail trade or business is carried on were the occupier of a shop."

Both with regard to the definition of shop in s. 74 (1) and with regard to s. 58 I cannot hold that a retail trade or business is carried on in a mobile shop. At a mobile shop no doubt retail sales are made, but that is different from saying that a retail trade or business is carried on there. A man carries on business from an address. I do not think that the words in those sections apply to a mobile van of this sort. I do not for my part think it necessary to go into a long account of the Shops Acts or the Scottish cases, because *Eldorado Ice Cream Co., Ltd. v. Clark* (1), to which the justices refer, which is a decision of this court, is binding on us. Whether, if the case was *res integra*, we might come to a different decision I need not inquire. *Eldorado Ice Cream Co., Ltd. v. Clark* (1) was a case where a box tricycle, from which ice cream is commonly sold now, was attacked as a retail shop, and there is no difference between a mobile van and a tricycle. The distinction sought to be drawn here is that, though the court held in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) that the tricycle could not be a shop within the definition or extension section in the Act of 1936, that case left open the question whether a place, that is to say, the actual piece of ground on which the tricycle stands, could be a shop. That is why, as counsel for the appellant in his very well-sustained argument told us, the information in this case charged the respondent with selling from a place, which was the piece of ground in front of a house in the street. It seems to me that that is not a place where the respondent had set up a place of business or had established himself as, for example, people establish themselves nowadays at the side of a road on Sundays by putting out a table and selling flowers or fruit. It was simply the place where he stopped, and it seems to me that it would be fanciful to distinguish this case from *Eldorado Ice Cream Co., Ltd. v. Clark* (1) on the ground that that case was dealing with a charge which alleged that a man sold from a tricycle and in this case it is said he sold from a place, namely, where the tricycle or van stopped. We must try to construe these matters in a way which the public can understand. *Eldorado Ice Cream Co., Ltd. v. Clark* (1) seems clearly to decide that a moving vehicle such as a tricycle is not within the provisions of this Act. It would be wholly artificial to hold that although tricycles are not within the Act of 1950 the place at which a tricycle comes to a stand is within the Act. So long as *Eldorado Ice Cream Co., Ltd. v. Clark* (1) stands we are bound by it. That we hold that these mobile shops are not within the Shops Act, 1950, is a matter which no doubt the appropriate government department which has to deal with these matters may take into account. This decision is in consequence of that which took place in 1938. Although the Shops Act, 1950, was a consolidating Act there could always have been an amending section to alter the effect of the decision in *Eldorado Ice Cream Co., Ltd. v. Clark* (1), but it has not been altered.

For these reasons, I am of opinion that the justices were quite right in holding that they were constrained by *Eldorado Ice Cream Co., Ltd. v. Clark* (1) to hold that an offence had not been committed. Therefore this appeal fails and must be dismissed.

SLADE, J.: I agree that this appeal fails because this court is bound by the decision of the Divisional Court in *Eldorado Ice Cream Co., Ltd. v. Clark* (1). I respectfully agree with my Lord that it would be too fanciful to draw a distinction between a box tricycle and the land on which the box tricycle stood at the time the retail sale was effected and the facts of the present case. Had the matter been *res integra*, I am bound to say that I should have come to a different conclusion. Section 47 of the Shops Act, 1950 says:

(1) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

"Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday."

A shop is defined by s. 74 (1) as including any premises where any retail trade or business is carried on. In a sense, therefore, the expression "shop" may be said to be linked to the word "premises". Then one has s. 58 of the Act of 1950, the rubric of which is: "Extension of foregoing provisions of Part 4 to retail trading elsewhere than in shops", which means elsewhere than in shops as defined by s. 74 (1). Section 58 says that the provisions shall extend to any place where any retail trade or business is carried on. The intention of that Act, as of the Act of 1936, which was the Act considered in *Eldorado Ice Cream Co., Ltd. v. Clark* (1), was to prohibit Sunday trading by retail save for the exceptions provided for in the Act; and I would have given the word "place" in the extension provisions of the Act of 1950 the widest possible interpretation. I am fortified in taking that view by the decision of the High Court of Justiciary in Scotland in 1949 in *Nixon v. Capaldi* (2). That was a decision under s. 9 of the Shops Act, 1912, and it is true that s. 9 of the Act of 1912 had no relation to Sunday trading, but dealt with bringing the conditions of employment in shops into line with the conditions of employment in factories. There is, in my view, however, no distinction so far as the wording is concerned, and the High Court of Justiciary came in that case to a decision on the meaning of the word "place" which cannot be reconciled with the meaning given to it in *Eldorado Ice Cream Co., Ltd. v. Clark* (1). I merely refer to *Cowlairs Co-operative Society, Ltd. v. Glasgow Corpn.* (3), a decision of the Court of Session to which counsel for the appellant drew attention in his admirable argument, to say that I see nothing in it to conflict with the decision in *Nixon v. Capaldi* (2).

I should again like to emphasise, as the Lord Chief Justice has done in this court on more than one occasion, the desirability of allowing within limits an appeal in a criminal cause or matter beyond this court, but at present as the law stands no further appeal lies. I agree that this appeal should be dismissed.

DEVLIN, J.: I agree. Three attempts have now been made to bring mobile vans which act as shops within the purview of the Shops Acts which have been consolidated in the Shops Act, 1950. In the first place it has been suggested that a mobile van which is fitted up as a shop is in the popular sense of the word a shop and therefore quite capable of being brought within the Act, and that the definition in the Act is not comprehensive; it merely says that a shop includes premises, and there is no reason why mobile vans should not be treated as shops for the purposes of the Act. I confess to having a great deal of sympathy with that argument, but it has not been very fully explored and, I think, rightly so. It came before the Scottish court in *Cowlairs Co-operative Society, Ltd. v. Glasgow Corpn.* (3). That very argument was put up and was there rejected. It seems to me most desirable that, for the sake of uniformity of decisions under these statutes, we should follow, wherever possible, the decisions of the Scottish courts; and this decision excludes that argument. The second way of bringing a mobile van within the Act is to suggest that the van itself or the tricycle, or whatever it may be, is a place where retail trade or business is carried on, because by virtue of s. 58 the Act is extended to any place where any retail trade or business is carried on as if that place were a shop. That failed in *Eldorado Ice Cream Co., Ltd. v. Clark* (1) and consequently it has not been suggested again here. The third way of doing it is to say that the place for the

(1) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

(2) 1949 S.C. (J.) 155.

(3) [1957] S.L.T. 288.

purposes of s. 58 is not the van or tricycle, but the ground on which the van or tricycle stands, and that way of bringing the matter within the Act has received the support of *Nixon v. Capaldi* (1), the Scottish case to which SLADE, J., referred. I agree with counsel for the appellant that one can distinguish *Eldorado Ice Cream Co., Ltd. v. Clark* (2) on that ground because LORD HEWART, C.J., in *Eldorado Ice Cream Co., Ltd. v. Clark* (2), said specifically that that argument as to the meaning of the word "place" had not been brought before the court and he was not dealing with it. I agree, however, also with the Lord Chief Justice and SLADE, J., that to make such a distinction would be to introduce an almost fanciful reasoning, and would also mean that a great deal of the argument that commended itself to LORD HEWART, C.J., and on which he based his judgment in *Eldorado Ice Cream Co., Ltd. v. Clark* (2), would be erroneous. Therefore, having to choose in that way between *Eldorado Ice Cream Co., Ltd. v. Clark* (2) and *Nixon v. Capaldi* (1), I should choose *Eldorado Ice Cream Co., Ltd. v. Clark* (2), and I should have the less hesitation in doing so because I should find difficulty in appreciating the basis of the decision in *Nixon v. Capaldi* (1) and much prefer the view that the ground on which the van or tricycle stands is not a place within the meaning of s. 58. I can state my reasons for that quite briefly. The Shops Act, 1950, is extended by s. 58 to any place where the retail trade or business is carried on, but not to any place where the sale happens to be effected. Here the place is alleged to be an area in Peterhouse Crescent, Woodbridge, situate outside No. 106. Clearly it may well have been that a dozen or a score of similar places could equally well be described as the place where a sale happened to be effected. Is that a place where any retail trade or business is carried on? Is each of them such a place? So to hold would be to strain the meaning of the Act in order to produce a result that is not in accordance with common sense. There are so many sections of the Act which make it clear that s. 58 has in mind a place where business is carried on in the ordinary sense of the word and not where any trader happens to effect a sale in the course of his business, there being to my mind a clear distinction between the two. No better section could be introduced as illustrative of that than the very section under which this prosecution was brought. That is s. 47, which says:

"Every shop shall, save as otherwise provided by this Part of this Act, be closed for the serving of customers on Sunday."

That, to my mind, makes it quite plain that the place is something which is fixed, a place where business is carried on, and not a place where a casual sale happens to be effected. The ordinary man could not make sense of a requirement of the law that, in the words of this information, he should close a place being a part of Peterhouse Crescent outside the dwelling-house No. 106. It is very undesirable that this court should strain to give meanings to a section of the Act which would be to produce a result incomprehensible to the traders who have to comply with it. The result is, as my Lord has said, that it must now be taken as definitely decided in these courts that a mobile van is not a shop within the meaning of the Shops Act, 1950, and if Parliament desires to make it so it must introduce new legislation for that purpose.

Appeal dismissed.

Solicitors: *Berrymans*, for *G. C. Lightfoot*, Ipswich; *Field, Roscoe & Co.*, for *Gotelee & Goldsmith*, Ipswich.

T.R.F.B.

(1) 1949 S.C. (J.) 155.

(2) 102 J.P. 147; [1938] 1 All E.R. 330; [1938] 1 K.B. 715.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND ASHWORTH, JJ.)

July 7, 1958

PRICE v. HUMPHRIES

Magistrates—Institution of prosecution—Consent of Minister required—Duty of clerk to justices and justice issuing summons—Position of prosecution when objection with regard to consent taken—When justices should allow case to be re-opened—National Insurance Act, 1946 (9 & 10 Geo. 6, c. 67), s. 53 (1).

The respondent was charged with offences under the National Insurance Act, 1946. By s. 53 (1) of the Act proceedings for an offence under the Act are not to be instituted except by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorised in their behalf. The prosecution did not prove that consent or authority at the trial, and after the prosecution's case had been closed it was submitted that the respondent had no case to answer because the prosecution had not proved the consent or authority and evidence of it could not be admitted at that stage.

HELD: it was the duty of the clerk to the justices and the justice who issued the summons to see that s. 53 (1) had been complied with; in the absence of objection taken by the defence before the prosecution closed their case that the requisite consent or authority had not been proved, the justices should have acted on the presumption that the duty had been discharged; the objection having been taken at a later stage, and being one of technicality, going only to procedure, the justices should have allowed the prosecution to re-open the case; and the case must be remitted to them with a direction to proceed with the hearing.

R. v. Waller (1910), (74 J.P. 81), applied.

Per LORD GODDARD, C.J.: there is a distinction between an objection that goes to the merits of the case and one which goes only to procedure. If an objection goes to the merits, the justices should be very careful about allowing the case to be re-opened where the prosecution have failed to prove something, but they should not allow a technical objection relating to procedure, where that has been held back until the last moment, to prevail.

R. v. Day, 104 J.P. 181; [1940] 1 All E.R. 402 distinguished.

CASE STATED by justices for the county of Worcester.

On Jan. 13, 1958, the appellant, Edward Price, an officer of the Ministry of Pensions and National Insurance, preferred two informations against the respondent, Michael Humphries that (i) on or about Mar. 28, 1957, at Broadheath Common, Worcester, contrary to the National Insurance Act, 1946, s. 52 (1), for the purpose of obtaining sickness benefit for himself under the Act, he knowingly made a certain false representation, to wit, that, because of incapacity, he had not worked since the date of the last medical certificate furnished by him on or about Mar. 15, 1957, whereas, in fact, between Mar. 15 and 28, 1957, he worked for Mr. D. J. Bushnell, Shoulton Farm, Hallow, Worcester; (ii) on or about Oct. 14, 1957, at Broadheath Common, Worcester, contrary to s. 52 (1) of the Act of 1946, for the purpose of obtaining for himself sickness benefit under the Act, he knowingly made a false representation, to wit, that, because of incapacity, he had not worked since the date of the last medical certificate furnished by him on or about Oct. 7, 1957, whereas, in fact, between Oct. 7 and 14, 1957, he worked for Mr. D. J. Bushnell, Shoulton Farm, Hallow, Worcester.

At the hearing of the informations at Worcester County Magistrates' Court on Feb. 11, 1958, the following facts were found. The respondent pleaded Not Guilty to the offences set out in the informations. After evidence had been given as to the facts of the case, the respondent, by his solicitor, asked whether the case for the prosecution was closed, and, on receiving an affirmative answer, submitted that there was no case to answer.

It was contended on behalf of the respondent that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance or by an inspector or other officer authorised in that behalf as required by s. 53 (1) of the Act of 1946, and, the case for the prosecution having been closed, evidence of the consent or authority could not be admitted. It was contended on behalf of the appellant that proof of such authority to prosecute was unnecessary except when required by the court, and it was stated that it was available for production, if required.

The justices dismissed the informations, being of the opinion that the objection was good in law, it being clear from the decision in *R. v. Day* (1) that, after the close of the case for the prosecution, no further evidence should be allowed to be adduced by the prosecution unless it was evidence on any matter which arose *ex improviso*, or the necessity for which no human ingenuity could have foreseen; the authorisation of the proceedings was not such a matter. The appellant now appealed.

Rodger Winn for the appellant.

The respondent did not appear.

DEVLIN, J.: There are many statutes which provide that a prosecution is not to be instituted except with the authority or consent of some particular officer, such as the Director of Public Prosecutions or some other officer who has to consider the matter before the prosecution is brought. This Case Stated raises a question of how, and to what extent, the prosecution is required to prove the existence of such authority and consent as part of its case on a prosecution brought under the National Insurance Act, 1946, which provides, by s. 53 (1):

"Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Minister or by an inspector or other officer authorised in that behalf by special or general directions of the Minister."

In the proceedings before the Worcestershire justices, the prosecution proved, or sought to prove, the substance of its case, and, after evidence had been given on the facts of the case, the respondent, by his solicitor, asked whether the case for the prosecution was closed, and, on receiving an affirmative answer, he submitted that there was no case to answer. His grounds were that the prosecution had failed to prove that the proceedings were instituted by or with the consent of the Minister of Pensions and National Insurance, that is, failed to comply with the sub-section which I have just read. He further contended that, the case for the prosecution having been closed, evidence of the consent or authority could not be admitted. The appellant contended that proof of such authority to prosecute was unnecessary except when required by the court, and he stated that it was available for production if required.

The justices, having had cited to them *R. v. Day* (1), came to the conclusion that the objection was good in law and that they ought not to allow the prosecution case to be re-opened because it was not evidence on any matter which arose, following the dictum laid down in that case, *ex improviso* or the necessity for which no human ingenuity could have foreseen, and, accordingly, they dismissed the informations.

The first thing to observe about s. 53 is that the authority or consent for which it provides is authority or consent that has to be given for the institution of the proceedings: "Proceedings for an offence under this Act shall not be instituted except by or with the consent of the Minister". Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue

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of a summons, and, when the summons is issued, that is the institution of the proceedings. The point, therefore, at which the consent or authority must be proved is at that point—before the summons is instituted, and it is the duty of the clerk of the justices if application is made to him, as it generally is, for the laying of the information or the issue of the summons, to see that the requirements of s. 53 are complied with, otherwise the summons will be a bad one. Accordingly, when the matter comes on before the court the point that has to be determined, if it is necessary to determine it, is whether the summons be good or bad, whether the proceedings were instituted with or without authority. The usual practice is for the prosecution to produce the formal document about which, as I said, the clerk and, indeed, the justice who issued the summons, ought first to satisfy himself to show that the summons was properly issued.

The question that we have to determine is: What is the position if he fails to do so, as he did in this case? I think that the position in law has been dealt with, and the law has been fully laid down in *R. v. Waller* (1). That was a case, it is true, of an indictment and of the consent of the Director of Public Prosecutions being necessary to that indictment, and the court dealt with it in this way. LORD ALVERSTONE, C.J., said this:

"In *R. v. Turner* (2) we considered the degree of evidence necessary to prove the consent in cases in which proof had to be given. The point which has now been taken is whether *prima facie*, and in the absence of objection by the prisoner, any evidence of that consent need be given at all at the trial. No doubt the giving of the consent is a condition which must be satisfied in fact, and unless it has in fact been given the indictment ought not to be allowed to go before the grand jury. But how far or under what circumstances that fact need be proved at the trial is a different matter. Under the Vexatious Indictments Act an indictment charging offences, in respect of which neither the prosecutor has been bound over to prosecute nor the person accused has been committed or bound over to appear and defend, cannot go before the grand jury without the consent of a judge or one of the law officers. But it is the duty of the clerk of assize to satisfy himself before the bill is presented to the grand jury that all the necessary steps preliminary to indictment have been taken, and, unless objection be taken by the prisoner that there was no consent in fact, it is to be presumed that the clerk of assize has discharged his duty in that respect."

I think, *mutatis mutandis*, that that reasoning applies exactly to this case. It is the duty of the clerk to the justices, or whoever issues the summons, to see that it is not issued unless the consent or the authority is produced, and there is a presumption which, indeed, is merely a facet of the wider maxim *omnia praesumuntur rite et solemniter esse acta* that the clerk has discharged his duty in that respect. Accordingly, *prima facie*, the position was that the summons had been properly issued and there was no need for the prosecution to take any further step unless objection was taken. If objection were taken, then they must be in a position to prove it. The nature of that proof in the case of the consent of the Director of Public Prosecutions was laid down in *R. v. Turner* (2), and we are not concerned with it here. Accordingly, I think that the justices were wrong in dismissing the information.

I should like to say a word about the position of the justices, whether or not they should allow a case to be re-opened, because it may well be that they found

(1) 74 J.P. 81; [1910] 1 K.B. 364.

(2) 74 J.P. 81; [1910] 1 K.B. 346.

it a rather confusing one. The authority on which they acted lays it down that, if the matter is one of substance, the prosecution ought not to be allowed to re-open its case. On the other hand, there are authorities which show that, if the matter is one of technicality, such as the proof of a statutory rule or order, or something of that sort, then the justices should allow the prosecution case to be re-opened. In my judgment, in matters of this sort where what is in issue is simply the question whether proceedings are properly authorised, no question really arises about re-opening the prosecution case at all. I think that the application of the principle in *R. v. Waller* (1) to the circumstances of this case is this, that, if the prosecution is allowed without objection to close its case, then the prosecution has done all that is necessary and the summons is presumed to be a good one and properly authorised. If the defence wants to challenge that and take objection, they should take their objection before the prosecution case is closed, and, having taken their objection, the burden will pass to the prosecution to produce what evidence they have which shows that the proceedings were duly authorised.

For these reasons, I think that the decision of the justices was wrong, the appeal should be allowed, and that the case should go back to the justices in order that they may proceed with the hearing of it.

LORD GODDARD, C.J.: I agree in the result, but I desire to say that the fact that we are differing from the justices does not mean any reflection on them, because I can well understand that, when justices have a case such as *R. v. Day* (2) cited and there is no answer by the prosecution citing some other authority, the justices may think they are bound by *R. v. Day* (2). I think that possibly they might have been in greater difficulties if *Middleton v. Rowlett* (3) had been cited to them; it would still more have led them to believe that they could not allow the further evidence to be given. When the sort of case arises such as we have here today, I think that justices would do well to bear in mind that there is a distinction between an objection which goes to the merits and one which goes only to procedure. If it goes to the merits and the prosecution have failed to prove something on which the guilt or innocence of the defendant depends, then justices must be very careful about allowing cases to be re-opened and must consider the doctrine laid down in *R. v. Day* (2). If it is only a matter which goes to procedure, as this does, and as it does in a large number of cases where the consent of the Director of Public Prosecutions' or anybody else's consent is required to the prosecution, then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve till the last minute, as where the prosecution are induced to say that they have closed their case, and it is objected that they have not proved consent to the proceedings having been instituted. If the difference between an objection which goes to the merits and one which only goes to procedure is borne in mind, many of the difficulties will be cleared up.

ASHWORTH, J.: I agree with both the judgments which have been given.

Appeal allowed.

Solicitor: *Solicitor, Ministry of Pensions and National Insurance.*

T.R.F.B.

(1) 74 J.P. 81; [1910] 1 K.B. 364.

(2) 104 J.P. 181; [1940] 1 All E.R. 402.

(3) 118 J.P. 362; [1954] 2 All E.R. 277.

QUEEN'S BENCH DIVISION

(DEVLIN AND ASHWORTH, JJ.)

July 8, 1958

Ex parte RIGBY

Magistrates—Offence triable summarily or on indictment—Application by prosecutor for summary trial—Application by conduct sufficient—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 55), s. 18 (1).

Section 18 of the Magistrates' Courts Act, 1952, provides: "(1) Where an information charges any person with an offence that is by virtue of any enactment both an indictable offence and a summary offence, the magistrates' court dealing with the information shall . . . proceed as if the offence were not a summary offence, unless the court, having jurisdiction to try the information summarily, determines on the application of the prosecutor to do so. (2) An application under the preceding sub-section shall be made before any evidence is called . . ."

An application by a prosecutor under s. 18 (1) for summary trial may be made either expressly or by conduct.

A defendant pleaded Guilty at a magistrate's court to taking and driving away a motor vehicle without the consent of the owner, contrary to s. 28 of the Road Traffic Act, 1930, an offence which could be tried either summarily or on indictment. After a police officer had given evidence of antecedents, the defendant's counsel addressed the magistrate in mitigation, and the magistrate then passed sentence. At no time during the hearing did the prosecution formally apply for summary trial.

HELD, that, by their conduct in proceeding with the case, the prosecution had made an application for summary trial sufficient to satisfy the requirements of s. 18 (1), and certiorari would not issue to quash the sentence on the ground that the magistrate had no jurisdiction to try the case summarily.

James v. Boukett, (1952), 116 J.P. 445, applied.

APPLICATION for leave to move for certiorari.

This was an *ex parte* application by Albert Edward Rigby, the applicant, for an order of certiorari to bring up and quash an order sentencing the applicant to three months' imprisonment and disqualifying him for one year from holding a driving licence for an offence under s. 28 of the Road Traffic Act, 1930; the order was made at the magistrates' court at Bow Street on June 18, 1958, by SIR LAWRENCE DUNNE, M.C., the chief metropolitan magistrate. The ground of the application was that the magistrates' court had no jurisdiction to try the information charging the offence against the applicant or to impose the sentence contained in the order. The following facts were in evidence. On May 31, 1958, the applicant was charged at the magistrates' court at Bow Street with taking and driving away a motor vehicle without the owner's consent or other lawful authority, contrary to s. 28 of the Road Traffic Act, 1930; by s. 28 the offence was triable either on indictment or summarily. The applicant was remanded on bail to appear at Bow Street court on June 18, 1958; he was not told that the offence was triable either summarily or on indictment and the prosecutor did not expressly apply to the court for a summary trial under s. 18 (1) of the Magistrates' Courts Act, 1952. On June 18 the applicant appeared again at Bow Street court and pleaded guilty to the charge; evidence was then given by a police officer, and, after counsel for the applicant had made a plea in mitigation of sentence, the chief magistrate sentenced the applicant. At no time during the hearing of the case on June 18 did the prosecutor expressly apply to the court for the case to be tried summarily under s. 18 (1) of the Act of 1952, nor was the applicant asked whether he wished the case to be tried summarily or on indictment.

I. McCulloch for the applicant.

DEVLIN, J.: The Criminal Justice Act, 1948, s. 28 (1), said "if application in that behalf is made by the prosecutor before the charge has been entered upon." Section 18 (2) of the Magistrates' Courts Act, 1952, provides: "An application under the preceding sub-section shall be made before any evidence is called . . .". In essence the wording seems to me to be the same. The whole question is: What amounts to the making of an application? In *James v. Bowkett* (1), where it was necessary for both sides either to apply for or to consent to a summary trial, it was held in effect that the express assent of the defence was sufficient and the conduct of the prosecutor was sufficient. That case turned on the question of what amounted to the making of an application. Here the question is what amounts to a proper application when it has to be made only by one side, the prosecution. It must follow from *James v. Bowkett* (1) that the same rule applies. The application can be made either expressly or by conduct which inevitably leads to the inference that it is being made. The essential point is the same in both cases. The court will dismiss this application and will refuse leave to apply for an order of certiorari.

ASHWORTH, J.: I agree.

Application refused.

Solicitors: *Avery & Wolverson.*

T.R.F.B.

(1) 116 J.P. 445; [1952] 2 All E.R. 320.

CHANCERY DIVISION

(ROXBURGH, J.)

July 2, 3, 16, 1958

WESTMINSTER CITY COUNCIL v. KING'S COLLEGE, UNIVERSITY OF LONDON

Rates—Limitation of rates chargeable—Heredity occupied for the purposes of a non-profit making organisation—Notice terminating the limitation of rates chargeable—When notice may be given—Rate made for second rating year before end of first year—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 and 5 Eliz., c. 9), s. 8 (3).

The city council was the rating authority for the district and the defendants long before Apr. 1, 1956, had been and still were the owners and occupiers of King's College, to which premises (for the most part) the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, applied. The new valuation list for the first year, as defined in s. 8 (2) of that Act, came into force on Apr. 1, 1956, and the defendants were allowed in respect of that year the reliefs provided for by s. 8 (2) (a). As from the commencement of the first year of the new list the defendants became entitled in regard to subsequent years to the reliefs provided for by s. 8 (2) (b), and before Feb. 1, 1957, it was the statutory duty of the council to consider the rate to be made for the second rating year (Apr. 1, 1957, to Mar. 31, 1958). On Mar. 14, 1957, a resolution was passed at a meeting of the council which approved the actual rate payable for the second rating year. By notice dated Mar. 27, 1957, and served by post on the defendants on Mar. 28, 1957, the council gave notice pursuant to s. 8 (3) of the Act that as from the end of the year ending Mar. 31, 1960, the limitation imposed by s. 8 (2) (b) of the amount of rates chargeable in respect of the premises would cease to apply. The defendants disputed the validity of the notice on the ground that it was served before the end of the first year of the new list on Mar. 31, 1957.

HELD: the notice under s. 8 (3) served on Mar. 28, 1957, was not premature, and, therefore, it was valid.

ADJOURNED SUMMONS.

The plaintiffs, the Westminster City Council, as rating authority for the district, applied to the court by originating summons for the determination under R.S.C., Ord. 54A, of the question whether, on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and in the events which had happened, a notice, dated Mar. 27, 1957, and served on the defendants on Mar. 28, 1957, in respect of certain properties forming part of the hereditaments known as King's College, Strand, in the City of Westminster, was valid and had the effect under s. 8 (3) of the Act of withdrawing from the defendants as from the end of the year ending Mar. 31, 1960, the limitation on the defendants' liability for rates in respect of the premises conferred by s. 8 (2) of the Act.

J. A. Wolfe for the rating authority.

W. B. Harris for the ratepayers.

Cur. adv. vult.

July 16. **ROXBURGH, J.**, read the following judgment: The plaintiffs are the rating authority for the parish of the City of Westminster. The defendants have been since a date long before Apr. 1, 1956, and still are, the owners and occupiers of the premises known as King's College, Strand, in the parish of the said city. Most parts of such premises (such parts being hereinafter called "the s. 8 premises") are premises to which s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (hereinafter called "the Act of 1955") applies. Section 8 (2) of the Act of 1955 provides:

"For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (b) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion: Provided that this sub-section shall have effect subject to the provisions of Sch. 5 to this Act in cases falling within that schedule."

Section 8 (3) provides:

"Where para. (b) of the last preceding sub-section has effect in the case of a hereditament, the rating authority may at any time give notice to the occupiers of the hereditament that, as from the end of a year specified in the notice, being a year ending not less than thirty-six months after the date on which the notice is given, the limitation imposed by virtue of that paragraph shall either cease to apply to the hereditament or shall be modified as mentioned in the notice; and where such a notice is given—(a) if the notice states that the limitation shall cease to apply, para. (b) of the last preceding sub-section shall not apply to the hereditament as respects any year beginning after the end of the year specified in the notice; (b) if the

notice states that the limitation shall be modified, then, subject to the operation of any further notice given under this sub-section, the said para. (b) shall have effect in relation to the hereditament as respects any such year with the substitution, for the proportion mentioned in that paragraph, of such lesser proportion as may be specified in the notice."

Section 8 (4) and (5) are as follows:

"(4) The rating authority for a rating area shall have power to reduce or remit the payment of any rate charged in respect of a hereditament to which this section applies for the first year of the new list or any subsequent year, including power further to reduce or to remit the payment of any rate in the case of which the amount chargeable is required to be reduced by virtue of the preceding provisions of this section.

"(5) The preceding provisions of this section, and the provisions of Sch. 5 to this Act, shall have effect, with the necessary modifications, in relation to rates charged for a rate period forming part of the first year of the new list, or of any subsequent year, as they have effect in relation to rates charged for the first year of the new list or for any subsequent year, as the case may be."

By notice dated Mar. 27, 1957, and served by post on the defendants on Mar. 28, 1957, the plaintiffs gave notice pursuant to s. 8 (3) of the Act of 1955 that as from the end of the year ending Mar. 31, 1960, the limitation imposed by virtue of s. 8 (2) (b) of the Act on the amount of rates chargeable in respect of the hereditaments set out in the schedule thereto (being the whole of the s. 8 premises) should cease to apply. The defendants dispute the validity of the said notice on the ground that it was served before the end of the first year of the new list which ended on Mar. 31, 1957, and the plaintiffs submit to the court the question whether this objection is well founded. If the notice was premature, the defendants will obtain the benefit of the limitation for a further rating year.

Before approaching the question of construction involved, I must outline the statutory machinery for the making and levying of a rate. This is a complicated task which I could never have undertaken without the great assistance given to me by counsel and those instructing them. The new valuation list provided for by the Act of 1955 was duly completed in regard to the parish of the City of Westminster, and the first year of the new list (as defined in s. 8 (2) of the Act) commenced on Apr. 1, 1956. During the currency of the first year of the new list, that is, before Feb. 1, 1957, it was the statutory duty of the plaintiffs to initiate the making of a rate for the second rating year which was to run from Apr. 1, 1957, to Mar. 31, 1958. Section 9 (2) (d) of the Rating and Valuation Act, 1925 (hereinafter called "the Act of 1925"), as modified and applied by s. 120 (1) and (2) and s. 121 (4) of the Local Government Act, 1948 (hereinafter called "the Act of 1948"), provides that every rating authority shall before Feb. 1 in each year transmit to authorities having power to issue a precept to that rating authority an estimate of the amount, calculated in the prescribed manner, which would be produced in the next financial year by a rate of a penny in the pound levied in the rating area.

The prescribed manner for making such an estimate is to be extracted from the Product of Rates and Precepts (London) Rules, 1948 (S.I. 1948 No. 883), and these rules involve taking into account any reductions in the amount of rates chargeable by reason of s. 8 (2) (b) of the Act of 1955 in the second rating year. Before Mar. 11, 1957 (still during the first rating year), the precepting authorities had to inform the plaintiffs of the amount in the pound to be levied under their precepts: see s. 9 (2) (e) of the Act of 1925. The plaintiffs then proceeded to

take steps which culminated in the following resolution passed at a meeting held on Mar. 14, 1957, whereby it was ordered:

"That, for the purpose of meeting the liabilities falling to be discharged by the council during the period commencing on Apr. 1, 1957, and ending on Mar. 31, 1958, a general rate of 14s. 2d. in the pound be made and approved for the said period; and that the said general rate be levied, subject to the provisions of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in accordance with the particulars contained in the rate book and valuation list in force for the parish of the City of Westminster during the said period; and that the said general rate be payable in two instalments, each of 7s. 1d. in the pound, on Apr. 1, 1957, and on Oct. 1, 1957, respectively, with additional items of 7d. in the pound over the area of Montpelier Square (payable in instalments of 4d. in the pound on Apr. 1, 1957, and 3d. in the pound on Oct. 1, 1957), and 2d. in the pound over the area of Hanover Square (payable in instalments of 1d. each on Apr. 1 and Oct. 1, 1957)."

Section 54 (1) of the Act of 1948 provides that the rate shall be deemed to be made on the date on which it is approved by the rating authority, and, accordingly, the purpose of the "making" of the rate for the second rating year was fulfilled before the notice was given. Within seven days thereafter the rate had to be published (see s. 6 (1) of the Act of 1925) and before Apr. 1 officers of the plaintiffs had to write out the rate books, giving effect therein to the reduction allowed by s. 8 (2) (b) of the Act of 1955: see *Rate Accounts (Metropolitan Borough Councils) Regulations, 1953 (S.I. 1953 No. 480)*, reg. 5. Then after Apr. 1 came demand notes, collection and recovery.

Section 8 of the Act of 1955 has already been discussed, and in part construed, by WYNN-PARRY, J., and the Court of Appeal in *St. Pancras B.C. v. University of London* (1). In that case the notice was served before the beginning of the first year of the new list, that is, on Mar. 21, 1956, and both courts decided that it was premature. That decision, of course, binds me, but the question is to what extent, if at all, I am bound by the ratio decidendi adopted by WYNN-PARRY, J., because, if binding, it would cover the present case. WYNN-PARRY, J., said: "... but clearly the provisions of para. (b) [of s. 8 (2)] cannot come into operation until the expiration of the first year" (that is, Mar. 31, 1957), and, accordingly, he held that no notice should be given before then. He must have proceeded on the basis that the words "has effect" in s. 8 (3) mean that the rates are due and presently payable. On that basis, and on that basis alone, could it be clear that the provision of para. (b) could not come into operation until Apr. 1, 1957, and on that basis, this case would be covered as well as that. That case, however, took a materially different course in the Court of Appeal, although the actual decision was affirmed. The argument of counsel for the rating authority is stated in the judgment of LORD EVERSHED, M.R.:

"The real force, I think, of the argument of counsel for the rating authority lay in the use of the three words 'at any time'; for, he submitted, 'at any time' means 'at any time'. This Act came into operation on July 27, 1955. His submission is that at any time after the Act was part of the law of the land such a notice may be given..."

The Master of the Rolls rejected that submission, holding that the words "has effect" meant "has practical effect", and this conclusion forms no obstacle to the argument of counsel for the plaintiffs here. No doubt, the Master of the Rolls did show an inclination towards the ratio decidendi of WYNN-PARRY, J., but the powerful argument of counsel for the plaintiffs in the present case would have

(1) 121 J.P. 422; [1957] 2 All E.R. 395; *affd.*, C.A., 122 J.P. 55; [1957] 3 All E.R. 673.

been out of place in that case, and the Master of the Rolls expressly left the way open for him by confining his decision to a notice given before Apr. 1, 1956. ROMER and ORMEROD, L.J.J., agreed. Therefore I am free to re-examine the section in the light of counsels' arguments.

First of all (argues counsel for the plaintiffs), I must attend to the opening words of s. 8 (2), "For the purposes of the making and levying of rates", which govern the whole sub-section. With this I agree. What, then, constitutes the "making and levying of rates"? Rates are "made" when the rating authority passes the appropriate resolution, and this, as has already emerged, is required by statute to be done before the beginning of the rating year in question. But, in my judgment, the process of "making" necessarily starts much earlier, in fact not later than Feb. 1, when the rating authority has to comply with its statutory duty of estimating the product of a penny in the pound rate in the next rating year. The word "levy" is to be found in one of the earliest rating Acts, the Poor Relief Act, 1601, and is there used in a very narrow sense. But the word is frequently used in the multifarious rating Acts, and often bears a wide meaning. In my judgment, the phrase "the making and levying of rates" is here used to describe the whole statutory process of raising money by means of a rate from start to finish. This interpretation fits well with para. (a) of s. 8 (2). Although the first year of the new list began on Apr. 1, 1956, the process of making a rate for that rating year had begun before Feb. 1, 1956, and part of the process of levying had begun before the end of March. Accordingly, para. (a) of s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, provides that the amount "chargeable" for the rating year 1956-57 shall not exceed the amount "charged" for the year 1955-56. I regard the contrast between "charged" and "chargeable" as significant, and in this connexion would refer to s. 8 (4). The process of making a rate for the second year of the new list was bound to begin before Feb. 1, 1957, because, in making an estimate of the amount which a rate of one penny in the pound would produce, the rating authority was bound to take into account the hereditaments in respect of which the amount of rates "chargeable" (not "charged") was statutorily reduced by virtue of para. (b) of s. 8 (2). Therefore, even as early as Feb. 1, 1957, para. (b) "had effect", and, in my judgment, no notice given after that date, and, a fortiori, no notice given after Mar. 14, 1957, when the rate for 1957-58 was actually "made", was premature.

Counsel for the defendants argued (adopting the ratio decidendi of WYNN-PARRY, J., to which the Court of Appeal had shown an inclination) that "has effect" means "has effect by creating a present liability to pay", which did not happen until Apr. 1, 1957. This argument seems to me to ignore the opening words of s. 8 (2), which are incapable of being confined to the present obligation of a ratepayer to pay, and, indeed, point to a process, and not to a liability at all. If, before Apr. 1, 1957, the rating authority finds King's College still in occupation, having had the benefit of the statutory reduction in the first year still current, the rating authority is bound to apply para. (b) of s. 8 (2) for the purpose of making and levying a rate for the second year beginning on Apr. 1, 1957. Accordingly, before Apr. 1, 1957, the paragraph has had "effect". Only the reduced amount is "chargeable" so long as s. 8 (1) remains applicable, and, accordingly, para. (b) has no effect on the amount "charged", that is, payable on or after Apr. 1, 1957. Accordingly, the notice served on Mar. 28, 1957, was, in my judgment, not premature.

Solicitors: *Allen & Son; Slaughter & May.*

Order accordingly.

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COURT OF APPEAL

(LORD EVERSHED, M.R., ROMER AND ORMEROD, L.J.J.)

June 9, 10, July 17, 1958

Re COLE (deceased). WESTMINSTER BANK, LTD., AND
ANOTHER v. MOORE AND ANOTHER*Charitable Gift—Gift to local authority—"For general benefit and welfare of children" in home kept by local authority.*

The testator, by his will, dated Dec. 24, 1952, specifically devised two freehold houses on trust "to apply the income arising therefrom . . . for the general benefit and general welfare of the children for the time being in S. House . . . as a small token of my appreciation of the work carried on at such house . . . I desire that the superintendent for the time being of S. House should be consulted with a view to ascertaining his view as to the allocation of the before mentioned income." The testator died on Apr. 5, 1955. S. House was a home provided and maintained by the county council pursuant to the Children Act, 1948, s. 15, for the accommodation of children in their care either received under s. 1 of the Act of 1948 or under the Children and Young Persons Act, 1933, ss. 57, 62, 63, 64 (as amended), 66 and 67.

HELD: (i) on its true construction, the gift was not for the upkeep of S. House, but was for the general welfare and benefit of the children being there at any time; (ii) (LORD EVERSHED, M.R., dissenting) the gift was partly for a non-charitable object because it could be used for the provision of television sets, gramophones, records, and the like for children in S. House, which could not be regarded as coming within any conception of charity to be found in the preamble of the Charities Act, 1601, and, therefore, the gift was invalid.

APPEAL by the second defendant, the East Sussex County Council, and a cross-appeal by the first defendant, Frederick Arthur Moore, against an order of HARMAN, J., made on Dec. 5, 1957. On the application of the plaintiffs, the trustees of the will of the testator, Henry Gibbins Cole, deceased, by originating summonses dated July 16, 1957, HARMAN, J., declared, among other things, that the specific devise of the freehold properties St. Anton and Kinninghall to the East Sussex County Council contained in cl. 6 of the will of the testator failed.

Denys B. Buckley for the second defendant, the East Sussex County Council.
C. J. Slade for the plaintiffs, the trustees.

Tonge for the first defendant, interested in residue.

Cur. adv. vult.

July 17. The following judgments were read.

ROMER, L.J.: This is an appeal from an order of HARMAN, J., dated Dec. 5, 1957, whereby he made a declaration as to the manner in which certain charges created in favour of Westminster Bank, Ltd. by the testator during his lifetime should be borne and a further declaration that a specific devise contained in cl. 6 of the testator's will failed and the property fell into residue. The defendants, the East Sussex County Council, appeal against the second of these declarations, and a cross-notice of appeal has been served by the defendant Moore against the first declaration. The cross-notice only arises for decision if this court reverses the judge's declaration as to the invalidity of the specific devise, and I, accordingly, propose to deal with that question first.

By his will dated Dec. 24, 1952, the testator appointed Westminster Bank, Ltd., the plaintiff, H. T. Philcox, and the defendant, F. A. Moore, to be the executors and trustees thereof; and after making certain bequests not material to the present appeal provided by cl. 6 of his will as follows:

"I devise my freehold houses 'St. Anton' Meads Road Seaford aforesaid and 'Kinninghall' Meads Road Seaford aforesaid unto the East Sussex

County Council Upon trust to apply the income arising therefrom or from any substituted investments of the proceeds of sale of the said dwelling-houses for the general benefit and general welfare of the children for the time being in Southdown House Firle Road Seaford aforesaid as a small token of my appreciation of the work carried on at such house. If however Southdown House shall be sold or cease to be utilised as a home for children then I direct that the East Sussex County Council shall apply the income from the said dwelling-houses or any substituted investments at the council's absolute discretion for the benefit of the children in other homes for children carried on under the auspices of the East Sussex County Council. I desire that the superintendent for the time being of Southdown House should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income."

By cl. 7 of his will the testator gave his residuary estate on the usual trusts for sale and conversion and directed that after payment thereof of all his just debts funeral and testamentary expenses the same should be held on trust for the defendant F. A. Moore absolutely. The testator died on Apr. 5, 1955, and probate of his will was granted to the plaintiffs and the defendant Moore out of the District Probate Registry at Lewes on Sept. 28, 1955. On July 16, 1957, the plaintiffs issued an originating summons asking for directions as to the charges created by the testator as hereinbefore mentioned and also asking whether the specific devise contained in cl. 6 of the will was a valid charitable devise or whether it failed and fell into residue.

The first point which arises on this second question is whether the devise in cl. 6 "for the general benefit and general welfare of the children for the time being in Southdown House" was intended to enure for the benefit only of the children who were in the home when the testator died or for the benefit of future inmates from time to time as well. It is perfectly clear to me that the latter is the true view. The words "for the time being" sufficiently show this in themselves, but when one adds the consideration that the testator was directing the application of income and not of capital, and the fact that the home was only intended to provide temporary accommodation for the children received in it, no room, in my judgment, is left for doubt.

On this view of the matter, then, the devise fails unless it was for a charitable purpose. The purposes for which Southdown House is carried on are stated in the affidavit of Mr. H. S. Martin, who is the clerk of the East Sussex County Council. In his affidavit he says:

"Southdown House . . . is a home provided and maintained by the council pursuant to the Children Act, 1948, s. 15, for the accommodation of children in their care. Such children are either children received into the care of the council under s. 1 of the said Act or children committed to their care under the Children and Young Persons Act, 1933, s. 57, s. 62, s. 63, s. 64 (as amended), s. 66 and s. 67, to which sections of the said Acts I respectfully ask leave to refer. The said home provides accommodation for up to thirty children of either sex between the ages of five and fifteen. The said home is used as a short-stay and intermediate home, that is to say, as a home for children requiring to be cared for for periods ranging from a few weeks to two years or thereabouts, and is not intended to serve as a permanent home for young children who are likely to remain in the council's care until they reach the age limit under the Children Act, 1948, of eighteen years or are otherwise likely to be in the council's care for long periods.

"The staff of the said home consists of a married couple who are in charge of the said home and two female assistants, who all reside in the

said home, together with non-resident domestic staff. The children in the said home attend the usual local schools. No more education is provided in the said home than would be provided by parents in a normal domestic home, to which it is the object of the council to make the said home approximate as nearly as possible.

"The cost of providing and maintaining the said home is provided partly from grants out of moneys provided by Parliament, partly from the general rate fund of the Administrative County of East Sussex and partly from contributions received from parents under the Children Act, 1948, s. 23 and s. 24, and the Children and Young Persons Act, 1933, s. 86, as amended."

In order to ascertain the classes or categories of children whom the council have to receive into the home reference must be made to the Children Act, 1948, and the Children and Young Persons Act, 1933. By s. 1 of the former Act local authorities have to receive children under seventeen (though the age limit in Southdown House is fifteen) who have no parent or guardian or whose parents or guardian have abandoned them; those whose parents or guardians are for various reasons prevented from providing for their proper accommodation, maintenance and upbringing; and in either case if it appears to the local authority that its intervention is necessary in the interests of the welfare of the child. Section 11 provides that Part 2 of the Act relates to the powers and duties of local authorities in relation to children received by them into their care under s. 1 of the Act and (among others) children who by an order of any court under the Act of 1933 have been committed to their care as a fit person. By s. 15 local authorities have to provide homes as therein mentioned. Under s. 57 of the Act of 1933 any court by or before which a child or young person is found guilty of an offence punishable in the case of an adult with imprisonment shall have power to commit him to the care of "a fit person" (which, by s. 76, includes a local authority). By s. 62 juvenile courts may commit a child or young person in need of care and protection to the care of "a fit person". The expression "in need of care and protection" in relation to children is defined by s. 61 of the Act and includes (among others) those who are exposed to moral danger or are beyond the control of their parents and those against whom certain offences have been committed (see also s. 63 and s. 64). I think that the sections to which I have referred sufficiently indicate the kind of children who can and must be received into such homes as Southdown House; and, in relation to such children, the local authority (by virtue of s. 75 (4)) is to have the same rights and powers and be subject to the same liabilities in respect of their maintenance as if it were their parent.

Counsel for the county council contended before us, as he had contended before the learned judge, that the devise under cl. 6 of the will is within the spirit and intendment of the preamble to the Charitable Uses Act, 1601. The learned judge rejected the contention. According to the note we have of HARMAN, J.'s judgment, the learned judge said that the children referred to in the relevant statutory provisions were not "impotent" nor "orphans", that the reference in the preamble to the "payment of fifteens" had no application and that Southdown House was not a "house of correction". Counsel for the county council submitted to us that the gift should be upheld on the ground that the children in question are either orphans or in a position similar to that of orphans in that, having regard to their particular circumstances, they need care and attention which they cannot provide for themselves, but which are provided for them by the home. Their position, he said, is analogous to that of old people, and he submitted further that it would involve no misuse of language to describe them

as "impotent". For these reasons he submitted that they came within the sense of the statute. Now it may be (I say no more) that a gift for the endowment or maintenance of such a home as Southdown House would qualify as a valid charitable trust. That, however, is not the gift with which we are concerned. The devise in question is not to or for the benefit of Southdown House, but "for the general benefit and general welfare" of the children for the time being in it; and it appears to me that some at least of the argument before us was addressed to an issue which does not arise.

It is, of course, clear beyond controversy that if property is vested in trustees on trust to apply the income for purposes some of which are charitable and some of which are not, and the trust involves a perpetuity, then the whole gift fails; and none the less because the trustees do in fact apply the income to the specified charitable objects to the exclusion of those which are not charitable. A recent example of this rule is to be found in the well-known case of *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson* (1). The question, then, as it seems to me, is whether the East Sussex County Council can, within the terms of their trust under cl. 6 of the testator's will, apply the income of the devised properties to purposes which are not charitable or whether the trust confines them to a charitable application of the income. In my judgment, it is reasonably clear that the income could be applied "for the general benefit and general welfare of the children" in many ways that could not on any legitimate construction of the statute of Elizabeth I be regarded as charitable. I will take only one illustration. It is permissible to suppose that at any given time all or a considerable proportion of the children in the home may consist of juvenile delinquents, children who are beyond their parents' control and children who have been exposed to moral danger. It would appear to me that the provision of a television set or a gramophone and records and the like might well be regarded as being for the general benefit (which I take to mean benefit in a general way) of such children, and that some of the income could be applied to the provision of such amenities without any breach of trust being committed by the council. It is quite true that the illustrations or examples which are given in the preamble to the Act of 1601 are not exhaustive and a gift will be valid if it comes within the spirit and intendment of the statute: *Williams' Trustees v. Inland Revenue Comrs.* (2). Nevertheless, I cannot regard the provision of television sets, etc., for the benefit of such persons as juvenile delinquents and refractory children in Southdown House as coming within any conception of charity which is to be found in the preamble. If it were, then I suppose a gift to provide the inmates of a Borstal institution with amenities would be charitable, which would appear to me to be an impossible contention.

Counsel for the county council sought to avoid this conclusion by pointing to the reason of the devise as expressed by the testator, viz., "as a small token of my appreciation of the work carried on at such house". This language does not, however, confine the applications of the income to the carrying on of the work nor narrow the manner in which the council can properly deal with the income. Counsel also relied on the testator's desire, stated at the end of cl. 6, "that the superintendent for the time being of Southdown House should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income". Counsel suggested that the superintendent would only approve expenditure which was calculated to promote the physical well-being or moral welfare of the children and that such expenditure would be for a charitable purpose. Without expressing any view whether it would or not,

(1) [1944] 2 All E.R. 60; [1944] A.C. 341.

(2) [1947] 1 All E.R. 513; [1947] A.C. 447.

I do not think that counsel's point sufficiently meets the difficulty; for apart from the fact that the council would not necessarily be bound by the superintendent's views I see no reason why he should not recommend or approve of an expenditure on mere amenities if they were calculated to amuse and interest the children under his charge.

Accordingly, though for reasons which are somewhat different from those on which the learned judge founded his decision, I am of opinion that the devise in cl. 6 of the will is invalid. On this view of the case it becomes unnecessary to consider or decide the point raised by the defendant F. A. Moore as residuary legatee on his cross-appeal. That question arises from the fact that by a memorandum of deposit dated Nov. 24, 1952, the testator charged the two properties comprised in cl. 6 of his will with the debt due by him to the Westminster Bank, Ltd. By a memorandum of deposit dated Nov. 25, 1952, the testator charged another freehold dwelling-house known as Wytham Place, Scaford, with the same debt. At his death the testator was indebted to the bank in the sum of about £2,094, which was charged on these three properties. The two specifically devised properties are still retained by the executors, and one of them was valued for probate purposes at £1,250 and the other at £1,100. Wytham Place, which formed part of the residuary estate, was sold by the executors for £6,000, and a question arose as to how the charge on the three properties should be borne. HARMAN, J., following a previous decision of his own in *Re Biss, Heasman v. Biss* (1), made a declaration that the whole of the sum charged on the properties ought to be paid wholly out of the proceeds of sale by Wytham Place. By his cross-notice of appeal the defendant Moore asks that in the event of the main appeal succeeding a declaration should be made that the whole of the sum secured ought to be charged rateably on the three freehold properties in proportion to their respective values. As, in my judgment, the council's appeal does not succeed, this point does not arise. I desire, however, to keep open, until it arises as an issue in some future case, the question whether the decision of the learned judge in *Re Biss* (1) and his corresponding decision in the present case were correct. I would dismiss the appeal.

ORMEROD, L.J.: I agree with ROMER, L.J., that this appeal should be dismissed, and largely for the same reasons.

Counsel for the county council argued the case before the learned judge, and indeed before this court, on the basis that the gift in question was really a gift for the endowment of Southdown House, and that such a gift would be within the spirit and intendment of the preamble to the Charitable Uses Act, 1601, and therefore valid as a charitable trust. It appears from the note which is available of the learned judge's judgment that he rejected this contention on the ground that the children who, by reason of the various relevant statutory provisions, might be committed to the care of the home did not of necessity come within any of the classes referred to in the preamble, and that Southdown House was not a home of correction, and he came to the conclusion that the devise was not a charitable gift, as it tended to a perpetuity, and was therefore bad.

The question emerged before this court in the course of the argument whether, on a proper construction of cl. 6 of the will, the gift should be treated as one for the endowment or maintenance of Southdown House or as one for the benefit of the children for the time being committed to the care of those in charge of the home. The gift is one of income to be applied "for the general benefit and general welfare of the children for the time being in Southdown House". The fact that it is a gift of income and not capital and is to be applied for the benefit

and welfare of the children "for the time being" in the house, in my judgment, points strongly to the view that the gift was not intended to be for the endowment or maintenance of the home. It appears to be a fund intended to provide additional amenities for the children from time to time in the home which would not, or might not, in the ordinary way be provided for them by the local authority in the performance of their duties under the relevant statutory provisions. If this be the proper construction to put on cl. 6 of the will, it is unnecessary to decide whether a gift for the endowment or maintenance of Southdown House would be within the "spirit and intendment" of the Charitable Uses Act, 1601, and I express no view on it.

The question which remains is whether the gift, on the construction of the clause which I believe to be the right one, can be regarded as charitable. In my view it cannot be so regarded. There appear to be many ways in which the money in question can be applied which would be for the welfare and benefit of the children, and, therefore, within the terms of the gift, but which would not be charitable gifts in the legal sense. In these circumstances, in my judgment, the gift is invalid; and I would dismiss the appeal.

LORD EVERSHERD, M.R.: I have the misfortune to have arrived (I need not say, with very great diffidence) at a conclusion different from that which has commended itself to my brethren and to HARMAN, J. I agree with them in rejecting counsel for the county council's alternative suggestion that the gift was an absolute gift to those children whose chance it was to be at Southdown House at the moment of the testator's death. Counsel will, I hope, forgive me if I say no more on an argument which (having regard to the language used by the testator) has seemed to me wholly untenable. But I have in the end formed the view that the gift of the income of "St. Anton" and "Kinninghall" "for the general benefit and general welfare of the children for the time being in Southdown House" ought to be regarded as a good charitable gift.

The conditions to be satisfied by a gift claiming to qualify as charitable are easy enough to state. The purposes of the donor must have the necessary public quality: and they must have the charitable character derived from the "spirit and intendment" of the preamble to the statute 43 Eliz. 1 c. 4. No question arises in the present case as to the public quality of the relevant disposition. But can its purposes be discerned to fall within the spirit and intendment of the preamble? The problem, as I have said, is easy to state. The difficulty is, as it has so often been found to be in the numerous cases that have come before the courts, in the solution. It is not now in doubt that the scope or idea of "charity" which the examples in the preamble illustrate, is not limited to those examples or to other dispositions merely analogous to them: see *Re Strakosch, Temperley v. A.-G.* (1). "Spirit and intendment" comprehend, as I understand it, all dispositions in which is discerned the essential "charitable" characteristic possessed in common by all the preamble's examples. Notwithstanding the passage of three centuries, during which the courts have been able to attach the charitable label to large numbers and varieties of dispositions (and to reject the claim to qualify in no less a number of cases), the underlying idea seems to remain, at times, as elusive as ever. The truth may be that the possible variations of expressed intention by testators and settlors are as the sands of the sea, and that no catalogue of illustrations, however long, can exhaust or confine charity's scope. Moreover, the spirit and intendment of the preamble, as of any collocation of words, may fairly be understood differently by different minds. So in this instance it has seemed to me, with due respect to the opposite conclusions

of my brethren and HARMAN, J., that the spirit and intendment of the Elizabethan statute is such as to cover the present case.

I agree with HARMAN, J., that no useful clue can in the present case be derived from the word "impotent" in the trilogy, "aged, impotent and poor". HARMAN, J., however, according to the note of his judgment, thought equally irrelevant the reference to preferment of orphans, since the children in the present case were not, or were not necessarily, orphans, and because by the word "preferment" was meant apprenticeship. But, in my judgment, this view involves a restriction of the class of charitable purposes to those that are, at best, strictly analogous to the illustrations stated in the preamble; and I do not understand the scope of charity to be so confined. In my judgment, the inference was to be drawn from references such as those to the education and preferment of orphans, to schools of learning and free schools, and (perhaps also) to the marriage of poor maids; and the general emphasis in favour of gifts to and for persons suffering from disability and incapacity of various kinds is that the care and upbringing of children who for any reason have not the advantage or opportunity of being looked after and brought up by responsible and competent persons or who could, for these or other reasons, properly be regarded as defenceless or "deprived", are matters which *prima facie* qualify as charitable purposes. It was not doubted during the argument that gifts directed to the prevention of cruelty to children would be charitable: and the charitable qualification of such gifts depends, as I think, on the considerations which I have just stated rather than on the ethical or improving notion of such an activity as it would be in the case, for example, of a gift for the prevention of cruelty to animals. Thus, it would appear to me that a trust established during the last century (that is, before Parliament had imposed any duty of care for children on local authorities) for the purposes of the protection or upbringing of children in the parish or town of X, who, owing to the death, incapacity or unfitness of their parents or otherwise, could not be properly protected or brought up, would have been held charitable. If I am right so far, then the charitable nature of such purposes is not displaced merely by the circumstance that their execution is made by the Act of Parliament a duty of local authorities any more than the care of the sick and maimed has ceased to be a charitable purpose by reason of the so-called nationalisation of hospitals: see, e.g., *Re Hutchinson's Will Trusts*, *Gibbons v. Nottingham Area No. 1 Hospital Management Committee* (1) and cases there cited.

That, however, is not the end of the matter. The gift here is expressed to be "for the general benefit and general welfare of the children . . . in Southdown House", and it is coupled with an expression of desire that the superintendent of Southdown House should be consulted "with a view to ascertaining his views as to the allocation of the before mentioned income". The form of gift raises, therefore, two further questions, viz.: (i) What exactly are the purposes for which, and the manner in which, the institution known as Southdown House is carried on; and (ii) Even if the answer to the first question is such that the furtherance of the purposes and activities of Southdown House is *prima facie* charitable, does the phrase "for the general benefit and general welfare of the children" cover application of income of the fund which would extend beyond the statutory duties of the local authority in conducting the home, or which, for this or other reasons, would themselves be non-charitable?

The authority for the East Sussex County Council's activities as regards Southdown House is derived from the Children Act, 1948, s. 15, which, by sub-s. (1) empowers a local authority to "provide, equip and maintain . . . homes

(1) [1953] 1 All E.R. 996; [1953] Ch. 387.

for the accommodation of children in their care". Sub-section (4) empowers the Home Secretary to make regulations as to the conduct of such homes; and although no such regulations were referred to before us, it is to be noted that the regulations contemplated are directed to "securing the welfare" of the children in the homes with particular regard to such matters as accommodation, equipment and religious upbringing. Section 15 of the Act of 1948 is in Part 2 of the Act, which (by s. 11) is expressed to relate to the powers and duties of local authorities in relation to children received by them into their care under s. 1 of the Act of 1948, and children who, by an order of any court under the Children and Young Persons Act, 1933, have been committed to the care of the local authority "as a fit person".

Section 1 of the Act of 1948 imposes a duty on local authorities to receive into their care children of the classes mentioned in the section, and (by sub-s. (2)) to keep them in their care so long as the children's "welfare" appears so to require. The classes of children referred to are those of children (appearing to be not more than seventeen) who have no parents or guardians or have been abandoned, and those whose parents or guardians are prevented by incapacity or other circumstances from "providing for [their] proper accommodation, maintenance and upbringing". Finally, as regards the Act of 1948, s. 12 requires a local authority to exercise their powers with respect to any child in their care

"so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities."

The Children and Young Persons Act, 1933, is expressed as a consolidating Act concerned with persons under eighteen, and is (putting the matter generally) designed to protect such young persons against cruelty and exposure to moral and physical danger, and also in relation to criminal and summary proceedings. The inclusion of local authorities in the category of "fit persons" is provided by s. 76, which imposes accordingly on local authorities the duty of undertaking the care of children. Thus, s. 35 (1) (b) requires the appropriate local authority to be notified when a child is brought before any court on an alleged offence or as being "in need of care or protection"; and by s. 44 every court dealing with a child is to have regard to its "welfare" and in all proper cases to

"take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

There follow provisions for the establishment of juvenile courts, and by s. 57 power is conferred on courts in the case of a child found guilty of an offence "punishable in the case of an adult by imprisonment . . . to commit him to the care of a fit person". Section 61 defines the meaning of the phrase "child in need of care and protection"; that is to say (briefly) (i) a child who, having no parent or guardian or whose parent or guardian is unfit, is falling into bad associations, exposed to moral danger, or beyond control; and (ii) a child against whom incest or other like offences have been or may be committed. Section 62 empowers a juvenile court to commit a child in need of care and protection to the care of a "fit person": and by s. 64 a parent or guardian of an uncontrollable child is empowered to bring such child before a juvenile court for an order for the child's commitment to the care of a fit person. Finally, by s. 75 (4) a fit person to whom a child has been committed has, in regard to that child, while the order is in force, the powers and duties of a parent. It is, however, made clear in this Act, as it is also made clear in the Act of 1948, that these powers and duties of a local authority are without prejudice to the obligation of a parent or guardian to contribute to the child's maintenance.

Eng. Rev

My summary of the complicated provisions of the two relevant Acts is necessarily incomplete, but, I hope, not inadequate. It appears from the references which I have made that the home with which we are concerned is maintained by the East Sussex County Council for the care and upbringing of one or more of three possible classes of children which may be briefly defined thus: (i) children without parents or guardians, or with parents or guardians incapable for any reason of properly looking after them or bringing them up—what were called in the argument “deprived” children: (ii) children whose circumstances and surroundings expose them to moral or physical danger or contamination: and (iii) children who, for whatever reason, are out of control or uncontrollable, or have committed offences of a kind punishable in the case of an adult by imprisonment—what may for convenience be called, in modern terminology, “delinquent” children. For reasons which I have already attempted to state, a gift for the purpose of providing for the care and upbringing, in other words a home for the class of “deprived” children, within the area of the local authority is, in my view, a gift constituted for charitable purposes. In my judgment, a similar gift for the benefit of children of the second class above named within the area, whether alone or in conjunction with “deprived” children, would, for like reasons, also be within the spirit and intendment of the preamble. But what of the third class, the class of delinquents? I agree with HARMAN, J., that a home established for the care of such children cannot properly be described as a “house of correction”, as that phrase is used in the statute of the first Queen Elizabeth. Nevertheless, if I am right in thinking that the care and protection of children of the first two classes above mentioned is *prima facie* within the spirit and intendment of the preamble, the reference to houses of correction seems to me to support the view that the charitable nature of the purpose of looking after children is not negated by the circumstance that some (or even all) of the children who require care and protection are children who have fallen into evil associations and evil habits. After all, the notion underlying the relevant provisions of the Acts of 1933 and 1948 is surely that children of the delinquent class have fallen into their bad habits and associations through lack of care and protection which a home of the kind contemplated by the Acts can provide: and because, in the absence of such care and protection, they, as children, are defenceless against the temptations to which they are exposed. I should add that I do not think that the result is affected by the circumstance that the parents or guardians of the children are liable to contribute to their maintenance. There is no evidence before us of the extent to which in practice such contributions are obtained, but in the nature of things, and in the light of the general scope and background of the legislation, it could not, in my view, have been or be contemplated that such contributions would play in truth other than an entirely incidental or ancillary part in the general conduct of the homes.

It was not suggested in argument that because the effect of the disposition of this testator would be some relief of rates the result was materially affected. It follows, therefore, in my judgment, that if the purpose of the gift in the present case had been expressed to be towards the maintenance and equipment of the Southdown Home in accordance with the obligation of the legislation, it would have qualified as a good charitable gift. But there remains the second question posed above—the result altered by the use of the words “for the general benefit and general welfare” of the children in the home? It is on this form of words, as I believe, that my brethren have particularly relied as being inconsistent with a valid charitable gift. As ROMER, L.J., has put it in his judgment (which I have had the advantage of reading in advance) the effect of the words is to justify the use of the income of the property devised for the provision of

mere amenities, such as a television set or a gramophone for children of what I have called the delinquent class.

In my judgment, the question is really one of the construction of the words which I have quoted. The testator must, I think, be taken to have known the statutory purpose of Southdown House and the statutory powers and duties in regard to it of the East Sussex County Council. Indeed, he refers in terms to the nature of the work at the home and to his desire that his gift should be taken as a mark of his appreciation of that work. Construed in that context, the words "general benefit and general welfare" ought not, in my judgment, to be treated as meaning anything more than "generally for the benefit and welfare of the children in accordance with the local authority's obligations under the statutes". I must not be taken to be saying that the result would be different though the effect were to be to enable the council to apply that gift in acquiring for the children amenities which they might not otherwise be able to enjoy. It has been held (and, in my view, rightly) that a trust for providing amenities in publicly owned hospitals, if otherwise tending to further the purposes of the hospitals or to promote their efficiency, constitutes a good charitable gift (see, for example, *Re White's Will Trusts*, *Tindall v. United Sheffield Hospitals, Board of Governors* (1), and I see no reason why a parity of reasoning should not be applied to the case of the children in Southdown House. I have, in my citations from the relevant legislation, emphasised the use, more than once, of the word "welfare." I refer again to the language of s. 12 of the Act of 1948:

" . . . so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities."

In my judgment, the words used by the testator do no more than briefly express the same thing. Funds provided generally for the care of the sick and maimed are necessarily used for their general welfare and benefit, and intended by their very application to be so used. So here, the purpose of the provision of maintenance and equipment of Southdown House is for the general benefit and general welfare of the resident children. Indeed, the use of the adjective "general" seems to me rather to postulate the application of the gift towards the welfare and benefit of the children taken as a whole, than to contemplate its use for providing for particular children special advantages or means of enjoyment beyond the scope of the general intention of the Act in establishing these homes. If, therefore, matters rested with me, I would allow the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for Clerk to East Sussex County Council; *Haslewoods*, for *Philcox & Son*, Seaford.

F.G.

(1) [1951] 1 All E.R. 528.

COURT OF APPEAL

(JENKINS, PARKER AND PEARCE, L.JJ.)

May 16, 19, 20, 21, June 23, 1958

BAXTER v. STOCKTON-ON-TEES CORPORATION AND ANOTHER

Highway—Negligence—Non-feasance—Misfeasance—Construction of highway by county council—Highway later taken over by urban district council—Subsequent death of cyclist due to original dangerous construction.

Between 1938 and 1940 a county council constructed a road under the powers conferred by the Development and Road Improvement Funds Act, 1909, s. 8 and s. 10. In 1941 an urban district council took over the road pursuant to s. 32 of the Local Government Act, 1929, and thus became the highway authority with regard to it. One night in October, 1955, a motor cyclist collided with the kerb of an "island" approaching a roundabout in the road, the siting and lighting of which had not been altered since its first construction in 1938-40, and received injuries which proved fatal. In an action by his widow for damages under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the urban district council (now a county borough) as highway authority,

Held: the action failed in limine because the urban district council had merely kept the island as they found it when they took over the road; even if (which was not decided) the county council had so negligently sited the island as to cause a danger for which they might have been liable, any failure by the urban district council to remove the danger by improving the road consisted exclusively of non-feasance to which the ordinary immunity from liability of a highway authority applied.

PER CURIAM: The immunity afforded to a private owner of a road who dedicates it as a public highway has no application to a highway authority which constructs a new road pursuant to s. 10 of the Act of 1909.

The exemption from liability for non-feasance applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways unless it is excluded by the terms of some special enactment.

The positive act of constructing a road, if it be done negligently, amounts to misfeasance and not mere non-feasance. Failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance, and brought within the category of misfeasance, by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning.

APPEAL by the defendant highway authority from the decision of BARRY, J., in a reserved judgment dated Nov. 4, 1957, and given at Durham Assizes, awarding £4,500 damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, to the plaintiff as widow and administratrix of her deceased husband, who had died as a result of an accident on a highway in respect of which the defendants were the highway authority.

Quass, Q.C., Withers Payne and R. A. R. Stroyan for the highway authority.

Waller, Q.C., and Heptonstall for the plaintiff, the widow.

Cur. adv. vult.

June 23. **JENKINS, L.J.**, read the following judgment of the court.

This is an appeal by the Stockton-on-Tees Corporation from a judgment of BARRY, J., dated Nov. 4, 1957, whereby he awarded the plaintiff, Eileen Elizabeth Baxter, a total of £4,500 damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants as the highway authority responsible for the highway known as Fleet Bridge Road in the County of Durham in respect of the death of her husband, Alexander Ralph Baxter, from injuries sustained by him when a motor cycle on which he was riding at night along Fleet Bridge Road came into collision

with the kerb of an approach island adjacent to the Portrack roundabout. The basis of the claim was (in effect) that the accident was brought about by the negligence of the defendants as highway authority, in that the approach island was so shaped and sited that the part of it with which the motor cycle collided projected into the carriage way along which the deceased was riding, but the defendants nevertheless failed to light the island or the part of it so projecting, or to give users of the highway (including the deceased) warning (by means of traffic signs or otherwise) of the existence of the projection, which amounted to a concealed danger or trap.

The accident took place at about midnight on Oct. 14/15, 1955, when the plaintiff's husband, a company quartermaster sergeant in the R.A.S.C., and a highly skilled motor cyclist, was riding his motor cycle eastwards along the Fleet Bridge Road on his way from Norton near Billingham to Middlesbrough. In order to reach Middlesbrough he had to negotiate the Portrack roundabout, situated at the point where the Haverton Hill Road is intersected by the Fleet Bridge Road and its continuation towards Middlesbrough known as the Tees (Newport) Bridge Approach Road, which takes off from the roundabout nearly opposite the point at which the Fleet Bridge Road enters it.

Where it approaches the roundabout the Fleet Bridge Road is laid out as a dual carriage way by means of a central strip of grass edged with concrete kerbing, the northern carriage way being reserved for eastbound, and the southern for westbound, traffic. At the point of junction of the Fleet Bridge Road with the roundabout the central strip ends on the western side of an accommodation road joining the two carriage ways, and immediately beyond that comes the relevant approach island. This was a plot of grass in the shape of an irregular quadrilateral bordered by concrete kerbing some four inches high, its western and shortest side forming the eastern side of the accommodation road, its southern side in line with the kerbing on the south side of the central strip, its eastern side facing the central island of the roundabout and its northern side (the one with which the motor cycle collided) slanting or splayed outwards (or to the left from the point of view of eastbound traffic) from the line of the northern kerb of the central strip at a fairly pronounced angle. This slant or splay, though to a great extent compensated by a more gradual curve of the opposite side of the northern carriage way in the same direction, would give the effect to a person driving along the middle or right-hand side of the northern carriage way of a sudden turning of the off-side kerb diagonally across his front. We should mention, as some point was made of it, that shortly before it reaches the approach island the northern carriage way makes a very slight turn to the right.

The position as regards lighting and traffic signs at the time of the accident was this. There was a number of street lamps illuminated by gas disposed about the outer perimeter of the roundabout but these were operated on the half-night system, which means that they were automatically turned off at eleven p.m. On the perimeter of the central island of the roundabout there were four illuminated keep-left bollards, one facing down the northern carriage way of Fleet Bridge Road, one down the southern (or incoming) carriage way of Tees (Newport) Bridge Approach Road (which was also laid out as a dual carriage way), and one down each of the two sections of the intersected Haverton Hill Road (which were not dual carriage ways). These four bollards were accompanied by reflecting arrows pointing to the left. There was also an illuminated keep-left bollard on each of the approach islands. In the case of Fleet Bridge Road the bollard on the approach island faced diagonally to the right from the point of view of eastbound traffic, for the purpose of guiding westbound traffic into the southern carriage way, and could not be seen by anyone travelling east. The bollard on the approach

island in the case of the other dual carriage way was similarly faced from the point of view of westbound traffic to guide eastbound traffic into its proper path. We should note that in this case the shape and positioning of the approach island was very much the same as in the case of Fleet Bridge Road, but the leftward slant or splay was perhaps somewhat less pronounced. The two sections of Haverton Hill Road, not being dual carriage ways, were each provided with a central approach island on which was mounted an illuminated keep-left bollard facing down the road by way of warning to incoming traffic. The dual carriage way in the case of the Tees (Newport) Bridge Approach Road appears to have begun only a short distance from the roundabout, and its beginning was marked by another illuminated keep-left bollard facing down the road. Each of the four roads had on its near side coming in towards the roundabout an advance direction sign with reflector studs. In the case of Fleet Bridge Road, however, this sign was sited some twenty feet to the left of the carriage way. There were some red lamps placed round the central island to warn of certain work in progress, but there is a doubt whether these were alight at the material time and it is agreed that they should be disregarded for the purposes of this case.

The deceased was accompanied on his abortive trip to Middlesbrough by a friend, Sergeant Stockdale, also of the R.A.S.C. They had met at a dance at Norton, and agreed to go on to some other attraction in Middlesbrough. The deceased led the way on his motor cycle, Sergeant Stockdale following in a small car. The deceased's headlight was burning brightly, though apparently there was some question as to the condition of his dynamo. They set off, with the deceased leading at perhaps thirty-five miles per hour. Sergeant Stockdale lost sight of the deceased before they reached the roundabout (which was only about a mile from the hall where the dance was held) but attributed this to the fact that he slowed down because the road surface was bumpy. There was some degree of mist over the roundabout, which Sergeant Stockdale attributed to the I.C.I. works nearby. Sergeant Stockdale went on to Middlesbrough without seeing the deceased again, and waited for him there in vain. A police constable on his way home from duty soon after midnight found the deceased lying on the central island of the roundabout near the keep-left bollard facing down Fleet Bridge Road, seriously injured, with his machine lying on the same island some fifteen feet away. The deceased shortly afterwards died.

Another police constable who came on the scene a little later made a sketch plan based on his inspection of the area. This showed marks on the projecting kerbs and on the ring-road of the roundabout indicating that the motor cycle struck the kerb much where one would expect it to strike if the deceased had been driving straight along the middle of the northern carriage way, and had continued in that line without observing the slant or splay of the approach island towards his left; and that the impact was such that the motor cycle jumped the island, landing in the ring-road, and then bouncing or running on out of control to the place at which it was found on the central island, throwing the deceased at some stage in its course to the point where he was found near the keep-left bollard.

The Fleet Bridge Road was constructed between 1938 and 1940 by the Durham County Council under s. 8 and s. 10 of the Development and Road Improvement Funds Act, 1909, which by s. 8 (1) (a), as amended, provides as follows. The side-note is "Powers of Minister of Transport". Then:

"The Minister of Transport shall have power, with the approval of the Treasury—(a) to make to any highway authority advances in respect of the construction of new roads or the maintenance or improvement of existing roads, or to make such advances in conjunction with a highway authority, to any company or person."

Then s. 10 reads:

"(1) Where the Minister of Transport makes an advance to a highway authority in respect of the construction of a new road, the Minister may authorise the authority to construct the road, and where so authorised the highway authority shall have power to construct the road and to do all such acts as may be necessary for the purpose, and any expenses of the authority, so far as not defrayed out of the advance, shall be defrayed as expenses incurred by the authority in exercise of their powers as highway authority, and the enactments relating to such expenses, including the provisions as to borrowing, shall apply accordingly.

"(2) Where the highway authority to whom the advance is made are a county council, the new road, when constructed, shall be a main road and in any other case shall be a highway repairable by the inhabitants at large: Provided that the maintenance of any such road within the administrative county of London shall devolve upon the local authority responsible for the maintenance of streets and roads in whose district the same is situate."

It should be noted that "county road" is substituted for "main road" by s. 29 (1) of the Local Government Act, 1929.

The construction of this new road was projected in 1933, but apparently no funds for the purpose were available at that time. The plans were re-submitted by the Durham County Council to the Minister of Transport in 1936 and approved by the Minister in 1937 when a seventy-four per cent. grant was authorised. Work on the road was begun towards the end of 1938 and it was finished in 1940. It is not in dispute that the completed road (including the roundabout) was in conformity with the approved plans, and we understand it also to be agreed that the gas lamps, keep-left bollards, reflecting arrows, and advance direction signs which I have described were installed in the positions in which they stood at the time of the accident. We ignore for the purposes of this case work in progress at the time of the accident for the substitution of electric street lamps for the gas ones, as this change had not then become effective.

The defendants took over the Fleet Bridge Road from the county council in 1941 under s. 32 of the Local Government Act, 1929, which provides as follows. The side-note is "Rights of certain urban district councils to maintain county roads" and sub-s. (1) provides:

"Where an urban district has a population exceeding twenty thousand, the urban district council may claim to exercise the functions of maintenance and repair of any county road within their district, and if a claim is made within the time hereinafter limited, then, as from such date as is hereinafter mentioned, the urban district council shall be entitled to exercise those functions, and the road shall vest in that council, and for the purpose of the maintenance, repair and improvement of, and other dealing with, any such road, that council shall have the same functions as if they were as respects that road the highway authority and the road were an ordinary road vested in them."

Then sub-s. (2) says:

"Such claim as aforesaid must be made . . . (e) in the case of any road which becomes a county road after the appointed day, or after the date mentioned in any of the last three foregoing paragraphs, as the case may require, within twelve months after the date when it so becomes a county road."

We should mention that the county council were in the first instance joined as defendants, but that proceedings were later discontinued against them, no

doubt because it had become clear that by reason of its transfer to the defendant corporation the county council had long since ceased to be in any way responsible for the road.

From the time when they took over the road until the time of the accident to the deceased the defendants did not make any alterations to the roundabout or its approaches or the lights and traffic signs to which we have referred. They simply took over the road, roundabout, islands, lights, traffic signs, and all, from the Durham County Council and left them as they were, though no doubt doing what was necessary in the way of maintenance. The road which, we understand, carries considerable traffic, was, so far as is known, used without accident from its completion in 1940 down to Aug. 9, 1954, a matter of fourteen years. On the latter date there was an accident in which a motor cyclist collided with the same approach island, and there was another accident on May 9, 1955, in which something similar happened to a car. One of the police witnesses gave evidence about these two accidents from the police records, but no details were forthcoming as to the circumstances in which they took place. In these circumstances, it would appear to us that *prima facie* if the defendants were at fault at all in the matter of the approach island with which the deceased's motor cycle collided, their fault consisted exclusively in non-feasance with no element of misfeasance whatever.

The learned judge found it possible to hold the defendants liable. On the facts, he formed an extremely serious view of the danger constituted during the hours of darkness by the projecting part of the approach island, with the arrangements in regard to lights and direction signs as they were at the time of the accident. Accepting to the full the various criticisms of it put forward on the plaintiff's side he described it as a dangerous trap. In fairness to the county council and the defendants we feel obliged to say that we think that the learned judge took a somewhat exaggerated view of the danger. A person travelling the way the deceased was going would have to guide him (apart from the gas lamps up to eleven p.m.) the reflecting advance direction sign on his left, the illuminated keep-left sign and reflecting arrow to his front, and the light-coloured concrete kerb on his right. We should have thought that the driver of a car or motor cycle with moderately good headlights or headlight and not travelling at excessive speed might reasonably be expected to pick up these indications unless the weather conditions were exceptionally bad. It was said that the advance direction sign was too far out to the left, and that a driver would not notice the keep-left bollard and arrow until he had made his turn to the left. It was also said that the very slight curve to the right before reaching the approach island added to the danger. We are not altogether convinced by these criticisms, and are impressed by the apparent record of fourteen years without accident, the effect of which is not to our minds displaced by the bare fact of two accidents, one in 1954 and the other in 1955, with no information as to the circumstances in which they took place. Be that as it may, the learned judge, having found this to be a dangerous trap, went on to consider the question of liability. He began by rejecting (as we think, rightly) an argument raised by the defendants to the effect that when Fleet Bridge Road was completed and opened to the public the county council had dedicated the road as a public highway with the like legal consequences as attend the dedication of land as a public highway by a private owner. If this were right, then the consequences would ensue that the county council as dedicators of the road must be taken to have made it over to the public such as it was and subject to all hazards and inconveniences existing on it at the time of dedication, and that neither they nor the defendants as their successors in the office of highway authority could be

held liable for any damage arising from the approach island complained of, or under any obligation to obviate or mitigate that danger by lighting or traffic signs or other warning devices. We think that it is plain that when a highway authority constructs out of public funds a new road for the use of the public under statutory powers delegated to the authority by the Minister pursuant to s. 10 of the Development and Road Improvement Funds Act, 1909, and opens it to the public on completion, there is no question of the dedication of the road to the public by the constructing highway authority in any relevant sense of that expression. The highway authority in such a case constructs in exercise of the delegated statutory powers a road which, constructed as it is under those powers, cannot from first to last be anything else than a public highway, and comes into being as such. The immunity afforded to a private owner of land who dedicates it as a public highway in our view has no application to such a case. On the contrary, there is authority, to which we will later refer, for the proposition that a highway authority constructing a road for the use of the public under statutory powers is under a positive duty to take reasonable care to construct it properly.

It does not follow, however, that because a public highway originated as a new construction under statutory powers, as opposed to originating from dedication by some private owner, therefore the exemption from liability in damages for mere non-feasance does not extend to the highway authority for the time being responsible for its maintenance. In the case of a new road constructed by a highway authority the constructing authority may, as already mentioned, be under a special duty to construct it properly, but apart from that the origin of the road appears to us to be in itself irrelevant to the application of the exemption in respect of mere non-feasance; and if the learned judge regarded the exemption as excluded by the circumstances of the present case, as at one point in his judgment he appears to suggest, we cannot agree with him. The exemption, as we think, undoubtedly applies to all highway authorities made responsible by statute for the maintenance of any roads as successors to the surveyors of highways unless it is excluded by the terms of some special enactment, which is not the case here. The general principle is stated by LORD HALSBURY, L.C., in *Cowley v. Newmarket Local Board* (1), where he said:

"The facts were that the defendants are the Newmarket Local Board of Health, and the footway and the highway referred to were within the limits and under the care and management of the defendants as such local board of health; and the question appears to resolve itself into whether the public authorities in whom the highways are vested by the statute can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

"As long ago as 1788 a question of an analogous character was raised in the Court of King's Bench; and the argument, then as now, was that where one person receives an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission. In that case it was said (which seems to me to be decisive of this case) that the principle which decides against this kind of action is accurately stated in BROOKE'S ABRIDGMENT, tit. Action on the Case, pl. 93, where it is said that 'if an

(1) 56 J.P. 805; [1892] A.C. 345.

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highway be out of repair by which my horse is mired no action lies, "car est populus et surra reforme per presentment," which must be understood to mean that as the road ought to be repaired by the public no individual can maintain an action against them for any injury arising from their neglect': *Russell v. Men of Devon* (1)."

In *Sydney Municipal Council v. Bourke* (2), the principle was applied to roads constructed in Sydney, New South Wales, under certain local enactments. LORD HERSCHELL, L.C., delivering the judgment of the Judicial Committee, said this:

"It is admitted that the highway on which the disaster occurred was constructed by the appellants in the first instance quite properly. No complaint of misfeasance is made against them. The sole charge is one of non-feasance: that when the road had fallen into a bad condition, they failed to execute the necessary repairs. If, then, they are liable in the present action, it must be either because that liability has been expressly imposed by some enactment, or because the legislature has imposed some duty upon them for the breach of which a right of action accrues to any person injured by it."

Later he said this:

"In the series of cases ending with *Cowley v. Newmarket Local Board* (3), in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to show that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

Not to multiply citations unduly we will only add on this part of the case the following passages from the judgment of this court delivered by FINLAY, L.J., in *Swain v. Southern Rly. Co.* (4) where it was sought to extend the exemption in respect of mere non-feasance to the road on and approaches to a bridge for which the defendant railway company was responsible. FINLAY, L.J., said this:

"We may refer, as HUMPHREYS, J., in the court below referred, to *Pictou Municipality v. Geldert* (5) where the law is thus summarised by LORD HOBHOUSE, delivering the judgment of the Board: 'The latest English case is that of *Cowley v. Newmarket Local Board* (3), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed'."

That is LORD HOBHOUSE. Then FINLAY, L.J., said this:

"It is plain, in our opinion, that the principle originally applicable to the inhabitants, and applicable now to any public authority which may stand in

(1) (1788), 2 Term Rep. 667.

(2) 59 J.P. 659; [1895] A.C. 433.

(3) 56 J.P. 805; [1892] A.C. 345.

(4) [1939] 2 All E.R. 794; [1939] 2 K.B. 560.

(5) [1893] A.C. 524.

the shoes of the inhabitants, has no application to a case such as the present, where a company carrying on its business for profit, as one of the terms upon which it is given power to make its line, comes under an obligation with reference to bridges and the approaches thereto."

Later on, FINLAY, L.J., made this reference to the judgment of PALLES, C.B., in the Court of King's Bench in Ireland in *Dublin United Tramways Co. v. Fitzgerald* (1):

"In that judgment, after quoting the principle stated in BROOKE'S ABRIDGMENT, and after referring to the principle established by *Russell v. Men of Devon* (2) and *Cowley v. Newmarket Local Board* (3) [PALLES, C.B.] said: 'This principle, however, has never been applied to a trading corporation such as the present, and the principle upon which its extension has hitherto proceeded prevents it from being ever so applied. That principle rests upon the fact that in the matters complained of the exempted corporation represents the citizens that for the discharge of the duties entrusted to them, they are responsible to those whom they represent, and that if they fail to use their powers well they can be displaced at the next election. Bodies of this description in principle answer the description of the populus mentioned by BROOKE. This principle can have no application to the present case, in which the defendants are a private trading company'."

After discussing and rejecting the argument for the defendants based on dedication, BARRY, J., went on to state what we take to be his essential ratio decidendi in these terms:

"Here, the county council made the road, and they themselves created the source of danger of which complaint is made. It is not suggested, of course, that this approach island was a nuisance. The county council no doubt had power to erect islands, bollards and other obstructions as had the county council in *Fisher v. Ruislip-Northwood Urban District Council & Middlesex County Council* (4). This case, however, clearly establishes that the local authority must itself use reasonable care to give warning against obstructions however lawfully those obstructions may have been erected provided their erection was the act of the authority itself. I would also refer to the other cases relating to bollards, and the like, which are collected in PRATT AND MACKENZIE'S LAW OF HIGHWAYS (19th Edn.) at pp. 121 and 122. The extent of the duty to warn varies, of course, with circumstances, but, had the county council remained the authority responsible for the 'maintenance, repair and improvement' of this road, they would, in my view, in the year 1955 have been under a duty to give some adequate warning in the hours of darkness of the danger which they themselves had created by the construction of this protruding kerb. Having regard to the statutory provisions to which I have referred, a 'dedication to the public'—if such an act had any legal significance—would not, in my view, have absolved them from this duty. Therefore, had the county council still been the highway authority responsible for the maintenance of this road, I do not think they would have had any answer to the present claim. I have, of course, to consider whether this duty has been transferred to the present defendants."

Then after quoting the terms of s. 32 of the Local Government Act, 1929, the learned judge proceeded as follows:

(1) 67 J.P. 229; [1903] A.C. 99.

(2) (1788), 2 Term Rep. 667.

(3) 56 J.P. 805; [1892] A.C. 345.

(4) 110 J.P. 1; [1945] 2 All E.R. 458; [1945] K.B. 584.

"Under this section, as I read it, the function of maintaining the road is transferred to the defendants after the machinery provided for in s. 32 of the Act of 1929 has been put into operation. If I am right in my view, that as part of the exercise of this function the county council were obliged to take reasonable care to give warning against dangers which they had created, a similar duty in relation to this approach island and roundabout now, I think, vests in the defendants. The present position, as I see it, is quite different from that considered by the Court of Appeal in *Nash v. Rochford Rural Council* (1). Here there is no question of the transfer of a 'liability' in the legal sense of that term. What is in fact transferred to the present defendants under s. 32 of the Local Government Act, 1929, is a 'function of maintenance', and that function includes, in my view, a duty of care in relation to this roundabout and this approach island."

It will be seen that the learned judge reaches his conclusion by holding first that the county council would have been liable to the plaintiff if they had retained responsibility for Fleet Bridge Road down to the time of the accident, on the ground that they were under a duty to take reasonable care to give warning against dangers which they themselves had created in the shape of the approach island and roundabout; and, secondly, that a similar duty devolved on the defendants when they took over the road, with the result that they were under the like liability to the plaintiff for the accident as the county council would have been under it if they had retained the road; and that he assigned this duty of care to the "function of maintenance" transferred to the defendants under s. 32.

As to the hypothetical case against the county council, there is, as we have said, authority for the proposition that a highway authority constructing a road for the public use under statutory powers owes a duty to the public to take reasonable care to construct the road properly, so that it will be reasonably safe for the purposes for which it is intended to be used: see, for example, *McClelland v. Manchester Corpn.* (2), per LUSH, J.; *Thompson v. Bradford Corpn. & Tinsley* (3), per BAILHACHE, J.; and *Baldwin's, Ltd. v. Halifax Corpn.* (4), per ATKIN, J. Such cases are illustrations of the general principle enunciated in *Geddis v. Bann Reservoir Proprietors* (5), where LORD BLACKBURN said:

"For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently",

and see also per LORD PARKER OF WADDINGTON in *Great Central Ry. Co. v. Hewlett* (6). One may add that the positive act of constructing a road, if it be done negligently, may be said to amount to misfeasance and not mere non-feasance.

If there had been negligence on the part of the county council in the construction of Fleet Bridge Road and some person had been injured by a danger created by that negligence, while the county council was still in charge of the road, it may very well be that the county council would have been liable for such injury

(1) 81 J.P. 57; [1917] 1 K.B. 384.

(2) 76 J.P. 21; [1912] 1 K.B. 118.

(3) 79 J.P. 364; [1915] 3 K.B. 13.

(4) (1916), 80 J.P. 357.

(5) (1878), 3 App. Cas. 430.

(6) 80 J.P. 365; [1916] 2 A.C. 511.

on this principle. We are not wholly satisfied, however, that a case of negligence could have been made out against the county council on the facts of this case. The road was built in accordance with plans approved by the Minister, and there is no doubt that it was soundly constructed. The islands and roundabout and in particular the angle of splay of the Fleet Bridge Road approach island, which was designed to guide traffic into the roundabout headed in the right direction, conformed to the Ministry's requirements, and the elaborate system of traffic signs which we have described was installed. It would not have sufficed for the purposes of a charge of negligence against the county council merely to show that the system of traffic signs or the lighting arrangements might have been improved on. Be that as it may, we fail to see how the defendants could be held liable on this principle, inasmuch as they were not the constructors of the road.

There is, no doubt, another well established principle (on which the learned judge chiefly founded himself) to the effect that if a highway authority place an obstruction on the highway they must take proper steps by lighting or otherwise to protect the public from the danger constituted by the obstruction. See the case cited by the learned judge, *Fisher v. Ruislip-Northwood U.D.C. & Middlesex County Council* (1). Counsel for the plaintiff forcibly maintained before us that although the approach island was a perfectly proper feature or adjunct of the highway it was one which would be dangerous at night in the absence of lighting or some other form of warning, and consequently that the county council on this principle brought itself under a duty to guard against danger constituted by the island they themselves had constructed, by means of lighting or some other form of warning. He said that this was a continuing obligation which passed to the defendants when they took over the road. He disclaimed reliance on the defendants' duty as lighting authority under s. 161 of the Public Health Act, 1875 (on mere non-feasance in relation to which it is plain that no claim could be founded) but said there was a special duty, arising out of the presence of the island, to light it or to provide some other warning of its presence. Counsel for the defendants sought to meet this submission by contending that the island was not an obstruction but part and parcel of the highway itself. We doubt if this distinction is sound. It appears to us that the real answer to the submission of counsel for the plaintiff is that failure to light or give some other form of warning of an obstruction on the highway by a highway authority who themselves created the obstruction is taken out of the category of mere non-feasance and brought within the category of misfeasance by their positive act of creating the obstruction giving rise to the need for lighting or other means of warning. But no positive act in relation to the approach island was done by the defendants. They merely kept the island as they found it when they took over the road. The theory that the defendants inherited from the county council the duty to light or provide some other form of warning of the presence of the approach island appears to us (with respect to the learned judge) to be untenable in view of *Nash v. Rochford R.C.* (2). If, therefore, the defendants are to be held liable it can only be by virtue of some express words in the Act under which the road became vested in them. There is, however, nothing in s. 32 of the Act of 1929 to impose on an urban district council taking over a county road any special obligation as to the maintenance of the road so as to exclude the ordinary immunity from civil action in respect of mere non-feasance. On the contrary the concluding words of sub-s. (1)

(1) 110 J.P. 1; [1945] 2 All E.R. 458; [1945] K.B. 584.

(2) 81 J.P. 57; [1917] 1 K.B. 384.

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" that council shall have the same functions as if they were as respects that road the highway authority and the road were an ordinary road vested in them "

appear to us to indicate that in such a case the general principle of immunity in respect of mere non-feasance applies.

It does not appear to us that the improvement of the lighting of the roundabout, or the provision of better means of warning by traffic signs or otherwise of the situation and shape of the Fleet Bridge Road approach island, can, as the learned judge thought, be classed as maintenance. Even if measures of that kind could be so classed, that would be no ground for holding that the ordinary immunity in respect of mere non-feasance in regard to maintenance was excluded. Such measures being, to our minds, clearly works of improvement as distinct from maintenance, one might say that the ordinary immunity must a fortiori apply to the defendants' omission to take them.

For these reasons, we are of opinion that this action should have been held to fail in limine and would accordingly allow this appeal.

Discussion of the issue of contributory negligence is thus rendered unnecessary, but it must not be assumed that we accept the learned judge's finding on this aspect of the case.

Appeal allowed.

Solicitors: *Cohen, Jackson & Scott*, Stockton-on-Tees; *Archer, Parkin & Townsend*, Stockton-on-Tees, for *Mace & Jones*, Liverpool.

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(LORD GODDARD, C.J., SLADE AND DEVLIN, JJ.)

July 3, 4, 25, 1958

NATIONAL COAL BOARD *v.* GAMBLE

Criminal Law—Aiding and abetting—Ingredients of offence—Use of overloaded lorry on road—Knowledge of driver's intention to commit offence—Completion of sale of contents of lorry with such knowledge.

A lorry driven by one M., the servant of the owners, was loaded at a colliery with coal, which was part of a bulk purchase from the National Coal Board, for the purpose of transport to the purchaser. M. had taken the empty lorry to the colliery, where it was loaded by means of a hopper operated by a servant of the Board until M. told him to stop. M. then took the loaded lorry to the Board's weighbridge. The weighbridge operator, H., a servant of the Board, after weighing the load, told M. that it was overweight and asked M. whether he intended to take it. M. replied that he would risk it. H. then made out a weight ticket and M. drove away. There were facilities for off-loading at the colliery. M.'s employers were convicted of unlawfully using an overloaded vehicle on a road and the Board (who called no evidence) of aiding and abetting the offence.

HELD (SLADE, J., dissenting) that the conviction of the Board was right as (i) the sale being one of unascertained goods, the property in the coal did not pass to the purchaser until the weighing was completed and the purchaser had given his assent, such assent being shown by the handing to and acceptance by M. of the weight ticket; (ii) at the time when the property passed the Board's servant, H., knew of M.'s intention to commit the specific offence; (iii) the completion of the sale by the Board with knowledge of the intended illegality amounted to aiding and abetting the offence.

Observations by DEVLIN, J., on the difference between assistance voluntarily given with regard to the commission of a crime and failure to prevent the commission of a crime in relation to the offence of aiding and abetting.

CASE STATED by justices for the county of Derby.

On Nov. 29, 1957, an information was preferred by William Edward Gamble, the respondent, against the National Coal Board, the appellants, alleging that on Oct. 3, 1957, the Coal Board unlawfully aided, abetted, counselled and procured H. Wilson & Sons (Mosboro), Ltd., to commit the offence of using a heavy six-wheeled motor lorry on Chesterfield Road, at Peak Forest in the county of Derby, which with its load weighed more than twenty tons, in contravention of regs. 68 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. The information was heard by the justices at Chapel-en-le-Frith magistrates' court on Jan. 30, 1958, and the Coal Board were convicted and fined £3.

The following facts were found by the justices on the hearing of the information. On Oct. 3, 1957, a six-wheeled registered motor lorry was stopped by the police on Chesterfield Road and the gross weight of the lorry together with its load, was found to be twenty-three tons, eleven hundredweights. The lorry was driven by one Mallender, the servant or agent of H. Wilson & Sons (Mosboro), Ltd., the owners of the lorry, who were accordingly convicted and fined for committing an offence under regs. 68 and 104 of the Regulations of 1955. The lorry had been loaded with coal at the Coal Board's premises at Cotes Park Colliery, Somercotes in the county of Derby in the following manner. Mallender took the empty lorry to a hopper at the colliery, which was operated by the Coal Board's servant, telling the hopper operator when to stop loading. Mallender then took the loaded lorry to the Coal Board's weighbridge at the colliery to have the load weighed. The weighbridge operator, one Haslam, who was employed by the Coal Board, having weighed the lorry, informed Mallender that the load was nearly four tons over the permitted weight and asked him whether he intended to take the full load away; Mallender replied that he would risk doing so and accepted a weight ticket from Haslam and left the Coal Board's premises. The weight ticket which was addressed by the Coal Board to the Central Electricity Authority at Carrington, showed that the gross weight of the lorry and its load was twenty-three tons, eighteen hundredweights, the tare weight of the lorry, eight tons and six hundredweights and the net weight of the coal, fifteen tons, twelve hundredweights. On the door of the ticket office at the weighbridge a large notice was displayed warning owners and drivers of vehicles that the Coal Board were not responsible for the use of any vehicle on the road which was loaded beyond the permitted capacity. Off-loading facilities were provided by the Coal Board, and Mallender knew this and had off-loaded coal on to another vehicle on previous occasions. It was not the practice of the Coal Board's servants to give any orders to the drivers of vehicles but they were requested to act in accordance with the accepted practice at the colliery regarding loading and weighing vehicles. Mallender could not leave the colliery without receiving a weight ticket, but he believed that the Coal Board had no control over the loading of his lorry and that, if necessary, he could demand to be given a weight ticket. The Coal Board did not call any evidence and submitted that there was no case for them to answer; they contended that under s. 21 of the Weights and Measures Act, 1889 they were under a duty to issue a weight ticket to Mallender; that they had informed Mallender that his lorry was overloaded and if Haslam had refused to issue a ticket to him, there would have been trouble; that the Coal Board had no direct control over Mallender, and that no intention to aid, abet, counsel or procure the commission of the offence had been proved as the facts together with the notice on the door of the ticket office showed that in handing over

the weight ticket, the Coal Board's intention was to carry out an administrative act which they were bound to perform under the Act of 1889. The Coal Board relied on *R. v. Coney* (1). For the respondent, it was contended that the regulations of 1955 imposed an absolute liability and that, in order to prove the offence of aiding and abetting the commission of an offence under the regulations, it was only necessary to prove that the Coal Board's servants had full knowledge of the facts which constituted the substantive offence. The respondents relied on *Provincial Motor Cab Co., Ltd. v. Dunning* (2) and *Green v. Burnett* (3).

The justices were of the opinion that Haslam on behalf of the Coal Board could and ought to have refused to hand over to Mallender the fifteen tons, twelve hundredweights of coal knowing that Mallender proposed to use it in such a way as to break the law and that the handing over of the weight ticket to Mallender constituted the offence of aiding and abetting; the justices accordingly convicted the Coal Board. The question for the opinion of the court was whether, on the facts stated, the justices came to a correct decision in law.

Thompson, Q.C., and *Cowley* for the National Coal Board, the appellants.
P. Ashworth for the respondent.

Cur. adv. vult.

July 25. The following judgments were read.

LORD GODDARD, C.J., summarised the facts found in the Case Stated previously set out and, having said that the presence of the notice displayed on the door of the weighbridge office was immaterial for the purposes of the case, as, if an offence had been committed, the display of the notice could not protect the Coal Board, continued: In *Ackroyds Air Travel, Ltd. v. Public Prosecutions Director* (4) I stated the law with regard to aiding and abetting in this way:

"... a person could only be convicted—apart from some special exceptions—as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realised that those circumstances constituted an offence was immaterial. If he knew all the circumstances and those circumstances constituted an offence... that was enough to convict him of being an aider and abettor..."

HUMPHREYS, J., in the same case said:

"... it must be shown that the unlawful act has been committed, and, therefore, that the offence has been committed, and, further, that the person charged as an aider and abettor was aware of the facts sufficiently to enable him to know that the act was unlawful."

Now to enable one to decide whether the Coal Board were properly convicted as aiders and abettors it seems to me necessary to decide in the first instance when the property in the coal had passed. This was a sale of unascertained goods and the property in those goods passes on a sale when the parties intend it should pass and rules are set out in s. 18 of the Sale of Goods Act, 1893, for enabling the court to determine when property passes subject, of course, to the intention of the buyer and seller. In my opinion it is quite clear that neither party could have intended the property in the coal to pass when it was put from

(1) (1882), 46 J.P. 404; 8 Q.B.D. 534.

(2) 73 J.P. 387; [1909] 2 K.B. 599.

(3) 118 J.P. 536; [1954] 3 All E.R. 273; [1955] 1 Q.B. 78.

(4) 114 J.P. 251; [1950] 1 All E.R. 933.

the hopper into the lorry. The quantity would have to be ascertained in order to enable the price to be ascertained. The lorry is then taken to the weighbridge to be weighed and in my opinion no sale takes place whereby the property is passed until the weighing is completed and assented to by the buyer and this is shown by the handing to him and the acceptance by him of a weight ticket. In my opinion, therefore, no property passed until the weight ticket was accepted by Mallender.

Now as soon as Haslam weighed the coal he knew it was over weight and called Mallender's attention to that fact. From Mallender's answer he knew that he intended to drive the over-weighted lorry on the highway and with that knowledge he completed the sale and handed the weight ticket to Mallender whose duty then was to give it to the purchasers, namely, the Central Electricity Authority. Haslam could in my opinion have refused to allow the over-weight amount of three tons, eighteen hundredweights to leave the colliery. No specific amount had been asked for. The Coal Board were no doubt bound to deliver coal to the Electricity Authority under their contract, but were not bound to deliver any particular amount of coal at any particular moment. The justices drew the inference, and it was not disputed, that the Coal Board were bound by contract to supply a bulk quantity of coal to the authority. It was urged in this case on behalf of the Coal Board that they had no right to require Mallender to unload the coal or rather the excess, but with this I cannot agree. For the reasons that I have already given the property had not passed until the delivery was completed and it could only be completed by the weighing and the delivery and acceptance of the ticket.

Suppose a purchaser took his lorry to the hopper and asked for ten tons of coal or the Coal Board had offered to supply him with ten tons of coal. Nobody would know how much the hopper delivered until it had been weighed. If it was found that more than ten tons had been put into the lorry it seems to me beyond question that the Coal Board could insist on the excess being taken out. Here no specific amount was asked for but the Coal Board, by their servant, knew that more had been put into the lorry than could be lawfully carried on the road and with that knowledge completed the sale. In my opinion that amounted to an aiding and abetting of the offence, as Haslam knew that Mallender was going there and then to drive the lorry on the highway, that, in other words, a specific offence was contemplated.

In this connexion I would refer to *R. v. Bullock* (1) where *R. v. Lomas* (2) was distinguished. In so holding I do not think that an undue burden is placed on the Coal Board; if their weighbridge operators are instructed to refuse to give a weight ticket to the driver of a lorry which with its load exceeds the permitted maximum and the latter nevertheless drives away with the load, the Coal Board will not have aided or abetted the offence. Compliance with the requirements of the Weights and Measures Act, 1889, can be made by posting the ticket to the purchaser. The Coal Board obviously desire to maintain that the overloading of customers' lorries is no concern of theirs, but in that I cannot agree. The object of the legislation is to protect the roads of the country from damage to which the Coal Board would directly contribute if they allowed excessive weight to be taken from their premises. In my opinion, the justices came to a right decision in point of law and I would dismiss this appeal.

I will now ask DEVLIN, J., to read his judgment, and then I will read SLADE, J.'s dissenting judgment.

(1) 119 J.P. 65; [1955] 1 All E.R. 15.

(2) (1913), 78 J.P. 152.

DEVLIN, J.: A person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it; and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. I use the word "supplies" to comprehend giving, lending, selling or any other transfer of the right of property. In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article, but this has never been held to be aiding in law (see *R. v. Lomas* (1) and *R. v. Bullock* (2)). The reason, I think, is that in the former case there is in law a positive act and in the latter only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking; but a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony. Another way of putting the point is to say that aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances, and that proof of the intent involves proof of a positive act of assistance voluntarily done. These considerations make it necessary to determine at what point the property in the coal passed from the Coal Board and what the Coal Board's state of knowledge was at that time. If the property had passed before the Coal Board knew of the proposed crime, there was nothing they could legally do to prevent the driver of the lorry from taking the overloaded lorry out on to the road. If it had not, then they sold the coal with knowledge that an offence was going to be committed.

The Coal Board called no evidence, so that a good deal was left to inference; but the conclusions of fact reached by the magistrates have not been seriously disputed. The Coal Board had an instalment contract with the Central Electricity Authority for a supply of coal to be delivered at the colliery into lorries sent by a carrier on behalf of the authority. The quantity of each instalment was not prescribed and the inference is that the Coal Board were to deliver and the carrier to receive as much as each lorry could carry (which means of course as much as it could legally and safely carry) until the contract quantity was exhausted. The method of delivery was for the lorry to be loaded by hopper and then to proceed to a weighbridge; there were off-loading facilities if the load was found to be overweight. At the weighbridge a ticket was issued in accordance with the Weights and Measures Act, 1889, s. 21 (1), which provides that where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to any purchaser, the seller of the coal shall deliver or send by post to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note in the prescribed form. On this occasion the carrier's lorry was driven by one Mallender and its maximum legal load (after allowing for the tare weight) was eleven tons twelve hundredweights. It was loaded at the hopper, Mallender telling the operator when to stop. Mallender then took the lorry to the weighbridge. The weighbridge operator, one Haslam, weighed the lorry and its load and informed Mallender that his load was nearly four tons over-weight. Haslam asked Mallender whether he intended taking the load and Mallender said he would risk it; he then took the weight ticket from Haslam and left the colliery.

(1) (1913), 78 J.P. 152.

(2) 119 J.P. 65; [1955] 1 All E.R. 15.

In these circumstances *prima facie* the property in the coal passed on delivery to the carrier in accordance with r. 5 of s. 18 of the Sale of Goods Act, 1893. If the delivery was complete after loading and before weighing, the Coal Board had not until after delivery any knowledge that an offence had been committed; but where weighing is necessary for the purpose of the contract, as for example in order to ascertain the price of an instalment, the property does not pass until the weight has been agreed. In *Simmons v. Swift* (1), the parties agreed to buy and sell "the bark stacked at Redbrook at £9 5s. per ton". It was held that the property did not pass until the bark had been weighed and the price ascertained. BAYLEY, J., said that the concurrence of the seller in the act of weighing was necessary and he might insist on keeping possession until the bark had been weighed.

It was contended on behalf of the Coal Board that Haslam had no option after weighing but to issue the ticket for the amount then in the lorry. I think that this contention is unsound. In the circumstances of this case the loading must be taken as subject to adjustment; otherwise, if the contract were for a limited amount, the seller might make an over-delivery or an under-delivery which could not thereafter be rectified and the carrier might be contractually compelled to carry away a load in excess of that legally permitted. I think that the delivery of the coal was not completed until after the ascertained weight had been assented to and some act was done signifying assent and passing the property. The property passed when Haslam asked Mallender whether he intended to take the load and Mallender said he would risk it and when the mutual assent was, as it were, sealed by the delivery and acceptance of the weight ticket. Haslam could, therefore, after he knew of the overload have refused to transfer the property in the coal.

This is the conclusion to which the justices came. Counsel for the Coal Board submits that it does not justify a verdict of guilty of aiding and abetting. He submits, first, that even if knowledge of the illegal purpose had been acquired before delivery began, it would not be sufficient for the verdict; and secondly, that if he is wrong about that, the knowledge was acquired too late, and the Coal Board was not guilty of aiding and abetting simply because Haslam failed to stop the process of delivery after it had been initiated.

On his first point counsel submits that the furnishing of an article essential to the crime with knowledge of the use to which it is to be put does not of itself constitute aiding and abetting; there must be proved in addition a purpose or motive of the defendant to further the crime or encourage the criminal. Otherwise, he submits, there is no *mens rea*.

I have already said that in my judgment there must be proof of intent to aid. I would agree that proof that the article was knowingly supplied is not conclusive evidence of intent to aid. *R. v. Fretwell* (2) is authority for that. *R. v. Steane* (3), in which the defendant was charged with having acted during the war with intent to assist the enemy contrary to the defence regulations then in force, makes the same point. But *prima facie*—and *R. v. Steane* (3) makes this clear also—a man is presumed to intend the natural and probable consequences of his acts and the consequence of supplying essential material is that assistance is given to the criminal. It is always open to the defendant, as in *R. v. Steane* (3) to give evidence of his real intention; but in this case the defence called no evidence. The *prima facie* presumption is, therefore, enough to justify the verdict, unless it is the law that some other mental element besides intent is necessary to the offence.

(1) (1826), 5 B. & C. 857.

(2) (1862), 26 J.P. 499; Le. & Ca. 161.

(3) 111 J.P. 337; [1947] 1 All E.R. 813; [1947] K.B. 997.

This is what counsel for the Coal Board argues, and he describes the additional element as the purpose or motive of encouraging the crime. No doubt evidence of an interest in the crime or of an express purpose to assist it will greatly strengthen the case for the prosecution, but an indifference to the result of the crime does not of itself negative abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would be to negative the rule that *mens rea* is a matter of intent only and does not depend on desire or motive.

The authorities, I think, support this conclusion, though none has been cited to us in which the point has been specifically argued and decided. The Lord Chief Justice has quoted the statement of the law in *Ackroyds Air Travel, Ltd. v. Public Prosecutions Director* (1), which is consistent with the results reached in the earlier cases of *Cook v. Stockwell* (2) and *Cafferata v. Wilson, Reeve v. Wilson* (3), and with the later case of *R. v. Bullock* (4). The same principle has been applied in civil cases where the seller has sued on a contract for the supply of goods which he knew were to be used for an illegal purpose. In some of the authorities there is a suggestion that he could recover on the contract unless it appeared that in addition to knowledge of the purpose he had an interest in the venture and looked for payment to the proceeds of the crime. In *Pearce v. Brooks* (5), POLLOCK, C.B., stated the law as follows:

" . . . I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law."

The case chiefly relied on by counsel for the Coal Board was *R. v. Coney* (6). In this case the defendants were charged with aiding and abetting an illegal prize fight at which they had been present. The judgments all refer to "encouragement", but it would be wrong to conclude from that that proof of encouragement is necessary to every form of aiding and abetting. Presence on the scene of the crime without encouragement or assistance is no aid to the criminal; the supply of essential material is. Moreover, the decision makes it clear that encouragement can be inferred from mere presence. CAVE, J., who gave the leading judgment, said of the summing-up:

"It may mean either that mere presence unexplained is evidence of encouragement, and so of guilt, or that mere presence unexplained is conclusive proof of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law so laid down, if the latter, I am unable to do so."

This dictum seems to me to support the view which I have expressed. If voluntary presence is *prima facie* evidence of encouragement and therefore of

(1) 114 J.P. 251; [1950] 1 All E.R. 933.

(2) (1915), 79 J.P. 394.

(3) 100 J.P. 489; [1936] 3 All E.R. 149.

(4) 119 J.P. 65; [1955] 1 All E.R. 15.

(5) (1866), 30 J.P. 295; L.R. 1 Exch. 213.

(6) (1882), 46 J.P. 404; 8 Q.B.D. 534.

aiding and abetting, it appears to me to be a fortiori that the intentional supply of an essential article must be prima facie evidence of aiding and abetting.

As to counsel for the Coal Board's alternative point, I have already expressed the view that the facts show an act of assent made by Haslam after knowledge of the proposed illegality and without which the property would not have passed. If some positive act to complete delivery is committed after knowledge of the illegality, the position in law must, I think, be just the same as if the knowledge had been obtained before the delivery had been begun. Of course, it is quite likely that Haslam was confused about the legal position and thought that he was not entitled to withhold the weight ticket. There is no mens rea if the defendant is shown to have a genuine belief in the existence of circumstances which, if true, would negative an intention to aid; see *Wilson v. Inyang* (1). This argument, however, which might have been the most cogent available to the defence, cannot now be relied on, because Haslam was not called to give evidence about what he thought or believed.

The fact that no evidence was called for the defence makes this case a peculiar one. We were told that the Coal Board desired to obtain a decision on principle which would enable them to regulate their practice in the future. They therefore accepted responsibility for Haslam's act without going into any questions of vicarious liability; and they called no evidence in order, we were told, that the decision might be given on facts put against them as strongly as might be. What they wished to establish was that responsibility for overloaded lorries rested solely with the carrier and that the sale and delivery of the coal could not, if that was all that could be proved, involve them in a breach of the criminal law. For the reasons which I have given I think that the law cannot be so stated and that the appeal should be dismissed.

SLADE, J. [read by LORD GODDARD, C.J.]: Before a person can be convicted of aiding and abetting the commission of an offence the prosecution must prove: (a) that he knew the essential matters which constituted the offence: *Johnson v. Youden* (2), *Ferguson v. Weaving* (3); and (b) that with such knowledge he assisted, or at least encouraged, the principal offender to commit the offence.

Mere passive acquiescence is sufficient only, I think, where the alleged aider and abettor has the power to control the offender and is actually present when the offence is committed: for example, the owner of a car sitting alongside his chauffeur when the latter commits an offence.

In my judgment, the words "assist" and "encourage" necessarily import motive, i.e., purpose or object. It is not sufficient that the alleged abettor should be proved to have done some act, or to have made some omission, without which the principal offender could not have committed the offence; nor is it sufficient that such act or omission had the effect of facilitating the commission of the offence or that it in fact operated on the mind of the principal offender so as to decide him to commit it. The prosecution must prove that the act or omission on which they rely as constituting the alleged aiding and abetting was done or made with a view to assisting or encouraging the principal offender to commit the offence or, in other words, with the motive of endorsing the commission of the offence.

The foregoing brings me to the facts found, the inferences drawn and the opinions expressed by the magistrates. Counsel for the Coal Board invited the

(1) 115 J.P. 411; [1951] 2 All E.R. 237; [1951] 2 K.B. 799.

(2) 114 J.P. 136; [1950] 1 All E.R. 300; [1950] 1 K.B. 544.

(3) 115 J.P. 142; [1951] 1 All E.R. 412; [1951] 1 K.B. 814.

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court to identify the Coal Board with their servant Haslam and, if the court thought Haslam had aided and abetted Mallender, the lorry driver (who was not the servant of the Coal Board) to commit the offence, to treat the Coal Board also as being answerable for Haslam's offence. As I have reached the conclusion that there was no evidence on which the magistrates could find that Haslam had aided and abetted Mallender to commit the offence, I am prepared to deal with the appeal on the basis of counsel for the Coal Board's invitation, though I should have felt doubtful of the court's jurisdiction to do so in a criminal charge had my opinion been otherwise.

I accept the opinion of the magistrates that the property in the coal taken from the hopper and loaded into the lorry did not pass from the Coal Board to their customer, the Central Electricity Authority, until Haslam issued the weighbridge ticket to Mallender. It is, I think, clear that Haslam knew the essential matters which constituted Mallender's proposed offence when, but not until, he had weighed the coal. I do not think, however, that Haslam knew that it was the issue of the weight ticket which operated to pass the property in the coal and thus to complete the sale of the coal to the Coal Board's customer, and I regard this consideration as important in considering Haslam's motive in issuing the weight ticket. It is highly improbable that Haslam was acquainted with the provisions of s. 17 and s. 18 of the Sale of Goods Act, 1893, for ascertaining the intention of the parties with regard to the passing of the property in the coal, or that he ever applied his mind to the question of the precise moment at which the property in the coal would thereby be deemed to have passed. I will, however, assume against Haslam that such knowledge must be imputed to him. I then ask myself what courses were open to Haslam when he learnt, for the first time (i.e., on seeing the scale register the tare of the vehicle and the weight of the coal as in excess of twenty tons) the essential matters of the offence which he knew that Mallender intended to commit. Two courses only were open to him: (1) to call on Mallender to off-load the coal, or so much of it as was necessary to reduce the total weight to twenty tons, and to refuse to issue a weight ticket; or (2) to leave the coal where it was, thereby completing the sale, whereon he would have to issue the weight ticket in order to avoid contravening the requirements of s. 21 of the Weights and Measures Act, 1889. Haslam chose the second of these alternatives, and it is his adoption of this choice which has been held by the magistrates to constitute the aiding and abetting of Mallender's offence.

If there were any evidence that Haslam's exercise of this choice was inspired by a desire to encourage Mallender to commit the offence (which Haslam knew Mallender intended to commit) I would agree with the magistrates' decision. Some acts or omissions speak for themselves; they are consistent only with a desire to encourage or assist. Other acts or omissions are quite colourless and no sinister inference can legitimately be drawn from them. The motive for these can only be supplied by other conduct, for example, where an otherwise equivocal act is accompanied by words of encouragement to commit the offence.

Counsel for the Coal Board referred us to *R. v. Coney* (1), and particularly to the judgment of HAWKINS, J. *R. v. Coney* (1) was considered by the Court of Criminal Appeal in *Wilcox v. Jeffery* (2) and both these cases seem to me to emphasise the importance of ascertaining the motive underlying an act or omission relied on as constituting encouragement to another to commit an offence.

I do not think the magistrates applied their minds to the question whether Haslam issued the weight ticket and thereby completed the sale for the purpose

(1) (1882), 46 J.P. 404; 8 Q.B.D. 534.

(2) 115 J.P. 151; [1951] 1 All E.R. 464.

of, or with a view to encouraging Mallender to commit the offence, or whether he did so with no such purpose in mind. Indeed if I am wrong in my view that the words "encourage" and "assist" necessarily import "motive" there is no reason why they should have done so.

None of the facts found by the magistrates are in my judgment capable of supporting the inference that Haslam, in making the choice he did, issued the weight ticket and thereby completed the sale with a view to encouraging Mallender to commit the offence which Mallender informed him he intended to commit. On the contrary, I think the facts so found tend to negative rather than to support any such inference, for example, the large notice displayed by the Coal Board on the door of the weighbridge ticket office, nor can I see any reason why Haslam should desire to encourage the commission of the offence.

Moreover, if knowledge is not to be imputed to Haslam as to the precise moment when the property in the coal passed to the Coal Board's customer, I think Haslam was in a difficult position and may well have thought that he had no right to insist on the off-loading of the excess coal, that Mallender might well have demurred to any such insistence, and that he, Haslam, could only have enforced his demand by taking the law into his own hands.

For these reasons I think that the question raised by the Case should be answered in the negative, and that the conviction of the Coal Board should be quashed.

Appeal dismissed.

Solicitors: *Donald H. Haslam, for Laurence C. Jenkins, Nottingham; Kingsford, Dorman & Co., for D. G. Gilman, Derby.*

T.R.F.B.

COURT OF CRIMINAL APPEAL

(DEVLIN, DONOVAN AND ASHWORTH, JJ.)

July 14, 28, 1958

R. v. CHAPMAN

Criminal Law—Sexual offence—Abduction of unmarried girl under eighteen—Intention to have unlawful sexual intercourse—Meaning of "unlawful"—Sexual Offences Act, 1956 (4 and 5 Eliz. 2, c. 69), s. 19 (1).

Section 19 (1) of the Sexual Offences Act, 1956, makes it an offence "for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man."

"Unlawful" in the sub-section means illicit, i.e., outside the bond of marriage, and does not mean "forbidden by law," e.g., as being intercourse with a girl under sixteen.

APPEAL against conviction.

The appellant, Frank Chapman, was convicted at Winchester Assizes, before STABLE, J., and a jury on an indictment charging him with abduction in that he on Dec. 22, 1955, took an unmarried girl under the age of eighteen out of the possession and against the will of her father with intent that she should have unlawful sexual intercourse with the appellant, contrary to s. 19 (1) of the Sexual Offences Act, 1956. The appeal was on the ground that the intended intercourse was not unlawful, in the sense of being forbidden by law, because the girl was over sixteen and consented.

I. A. Kennedy for the appellant.

Inskip for the Crown.

Cur. adv. vult.

July 28. **DONOVAN, J.**, read the judgment of the court: The court has already dismissed this appeal for reasons which we now proceed to give.

The appellant was convicted at Winchester Assizes on Mar. 24 last before **STABLE, J.**, of an offence against s. 19 (1) of the Sexual Offences Act, 1956 (hereinafter called "the Act of 1956") which so far as material reads as follows:

"(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man.

"(2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of eighteen or over and has reasonable cause for the belief."

The facts were that the appellant, a married man with four children, in December, 1957, took an unmarried girl, aged sixteen and a few months, away from her parents' house at Southampton to Basingstoke. There they stayed at his sister's house, slept together and had intercourse. He then took her to Winchester to the house of another of his sisters to whom he introduced her as his wife. From Winchester the girl was taken back home by the police. He pleaded not guilty to the charge under s. 19, but was convicted by the jury and sentenced to eighteen months' imprisonment. On June 30 last the court gave leave to appeal solely for the purpose of enabling the appellant to argue a point of law which he took unsuccessfully before the trial judge, namely, whether the intended intercourse in this case could properly be described as "unlawful" as s. 19 requires. The appellant's main contention is that that word connotes intercourse which is forbidden by law, and since the girl was over sixteen it was not so forbidden in this case, however immoral it was. Alternatively, he says that the section applies only if the girl is taken away for intercourse in circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance, for example, to a house used as a brothel.

It is curious that the point has not apparently arisen before, because the Act of 1956 is a consolidating measure, and there is a long history behind many of its provisions, though not so long behind s. 19 itself. The researches of counsel for the appellant have revealed that in the reign of Philip and Mary, for example, a statute was passed making it an offence to take an unmarried girl under the age of sixteen out of the possession and custody and against the will of the father (4 & 5 Phil. & Mar. c. 8, s. 3). No particular intent, however, was specified as an ingredient of the offence. By the statute 18 Eliz. 1 c. 7, s. 4, it was enacted that if any person should unlawfully and carnally know any woman-child under the age of ten, it should be felony. It is difficult to suppose that "unlawfully" in this context meant contrary to some positive enactment. One would think that all intercourse with a child under ten would be unlawful; and on that footing the word would be mere surplusage. The same expression was used when this section was re-enacted in 1828 by 9 Geo. 4 c. 31, s. 17. When one comes to the Offences against the Person Act, 1861, one finds s. 49 making it an offence to have "illicit" carnal connexion with a woman or girl under twenty-one, if procured by false pretences or fraud; and s. 50 re-enacting that it shall be an offence unlawfully to have carnal knowledge of a girl under ten. The precursor of s. 19 of the Act of 1956 is, however, s. 7 of the Criminal Law Amendment Act, 1885, which provided that a person committed an offence who took an unmarried girl under eighteen out of the possession and against the

will of her parents with the intent that she should be "unlawfully and carnally known" by any particular man or generally. This is now in substance re-enacted in s. 19 of the Act of 1956. No great assistance is to be derived for present purposes from the language used in these earlier statutes, except that it does suggest that the word "unlawfully" in relation to carnal knowledge has not been used with any degree of precision. It would be natural, however, for the framers of a statute in days when the canon law would be more in their minds than today, to refer to any intercourse outside the bond of matrimony as "unlawful"; and for their successors when drafting consolidating Acts simply to repeat the word without a close consideration of its necessity or precise meaning.

We reject the argument that in s. 19 of the Act of 1956 the word "unlawful" connotes intercourse contrary to some positive enactment. The argument at once prompts the question why, if the intercourse in question is already positively forbidden, s. 19 should do it again. The answer suggested on behalf of the appellant is that under s. 19 the law can step in before unlawful intercourse actually occurs and so prevent the mischief. This is perhaps a little imaginative when one considers the circumstances of most abductions; but the answer seems to us to be this: the plain purpose of s. 19 is to protect young unmarried girls. That protection would be largely, if not wholly, illusory if in every case it were incumbent on the prosecution to prove that she was taken from her parents for the purpose of intercourse of a kind positively forbidden by some enactment, and not for intercourse not so forbidden. We do not think that such can have been Parliament's intention.

As regards the alternative suggestion that "unlawful" intercourse in s. 19 connotes intercourse in a brothel or something of that kind, it is sufficient to observe that to procure a girl to leave her home to become an inmate of or to frequent a brothel, or to become a common prostitute, is made a specific offence by s. 22 of the Act of 1956, and s. 19 is not therefore needed for this purpose.

If the two interpretations suggested for the appellant are rejected, as we think that they must be, then the word "unlawful" in s. 19 is either surplusage or means "illicit". We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view the word simply means "illicit", i.e., outside the bond of marriage. In other words, we take the same view as the learned trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in s. 17 and s. 18 of the Act of 1956, i.e., "with the intention that she shall marry or have unlawful sexual intercourse . . ."

There was ample evidence in the present case on which the jury could find that this girl was taken away by the appellant with the intent that he should have intercourse with her which was unlawful in the sense we have determined. As leave to appeal was given, however, to argue the point of law involved, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Town Clerk, Southampton.*

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, J.J.)

July 28, 1958

R. v. McCARTAN

Criminal Law—Sentence—Irish offender—Desire of court to return offender to Ireland—No jurisdiction to make return a condition of probation order—Common law binding over appropriate—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 3 (1), (2).

A court has no jurisdiction to make it a term of a probation order under s. 3 of the Criminal Justice Act, 1948, that the offender shall return to Ireland and remain there. Where, in the case of an offender from the Republic of Ireland or Northern Ireland, a court desires, instead of passing a sentence of Borstal training or imprisonment, to secure the return of the offender to Ireland, the appropriate course is to bind him over at common law and make it a condition of the recognisance that he returns forthwith to his own country and does not return to England for a specified period.

REFERENCE by the Home Secretary to the Court of Criminal Appeal under s. 19 (b) of the Criminal Appeal Act, 1907, and s. 38 (6) of the Criminal Justice Act, 1948, for their opinion on the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of a probation order that a probationer should return to Northern Ireland and stay there.

No counsel appeared.

LORD GODDARD, C.J.: In this matter the Secretary of State, under s. 19 (b) of the Criminal Appeal Act, 1907, has referred a question to this court for their opinion. As a rule, when a reference under that paragraph is made, the court consider the matter in private and write to the Home Secretary giving him their opinion, but in this matter, at the request of the Secretary of State, we are making public the advice we are giving the Home Secretary because it is a matter of some importance for the guidance of courts in the future.

There has been a considerable number of cases in the last year or two in which young men who are citizens of the Republic of Ireland or of Northern Ireland have come over to this country and committed offences for which, if they were citizens of this country, they would be sent to Borstal. Once or twice, in fact not infrequently, courts here, instead of sending these young Irishmen to Borstal, have taken a course with the object of sending them back to Ireland and seeing that they stay there.

The particular point which has arisen in the case of one Stephen McCartan, who has petitioned the Home Secretary, is that the judge before whom he was brought made a probation order and made it a term of the probation that he should return to Ireland and stay there. He went to Ireland and then came back and was taken up by the police because he was found drunk and incapable in the street. Having been dealt with for that, he was then brought before a court of assize for a breach of the probation order and received a sentence of twelve months. The Secretary of State raised the question whether it was regular or possible under the Criminal Justice Act, 1948, to make it a term of the probation order that a probationer should return to Ireland and stay there. In the opinion of the court, such an order cannot be made because s. 3 of the Act, which is the section which deals with probation orders, provides, by sub-s. (1), that a probation order can be made requiring the probationer, the subject of the order

“... to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years.”

Section 3 (2) provides:

“A probation order shall name the petty sessional division in which the

offender resides or will reside; and the offender shall (subject to the provisions of Sch. 1 to this Act relating to probationers who change their residence) be required to be under the supervision of a probation officer appointed for or assigned to that division."

If the attention of the court had been drawn to the provisions of that section, I think that it would have been clear at once that it was not in the power of the courts of this country to make it a term of the probation order that the probationer should go to Ireland and remain there, because he could not be under the supervision of a probation officer; nor is there a petty sessional division in this country which can deal with him if he breaks the probation order. There is no petty sessional division which can be named so that he could be required to be under the supervision of a probation officer appointed for or assigned to that division. If the court has before it one of these young men whom the court thinks should be made to go back to Ireland instead of remaining in this country and the court thinks that this country should not be put to the expense of keeping him at Borstal, the way to do it is to bind him over and make it a condition of the recognisance that he returns to Ireland and does not return to this country for such period as the court may think fit. That was the order which this court made in *R. v. Flaherty* (1). In that case I said:

"This boy was convicted at Bow Street under the Vagrancy Act, as a person loitering with intent, and he was sent to sessions for sentence with a view, I suppose, to his being sent to Borstal, and that was where the learned deputy chairman sent him."

Then I said: "He is just over nineteen", and went through his past history.

"He has some petty convictions against him, but it seems to the court that there is really no reason why British taxpayers should have to pay the considerable sum of money it costs to keep boys in Borstal training, and the best thing to do with him is to send him back to Eire."

I then called on the boy and said:

"The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train, where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years."

That is an order which, in the opinion of this court, can be made. It must be made in the form of a common law recognisance and not in the form of a probation order. We shall, therefore, inform the Secretary of State that in our opinion this probation order was one which the court had no power to make and the order will have to be quashed. I should say, I think, that in this case the petitioner is a citizen of Northern Ireland, but it is just the same. The probation officers in this country have no duties or powers in Northern Ireland: see s. 82 of the Criminal Justice Act, 1948; though probation orders of this country can apply in Scotland: see s. 9 of the Act of 1948, as substituted by the Criminal Justice (Scotland) Act, 1949, s. 77, s. 79 (2), and sched. 11.

It is, however, these Irish cases which we are now considering, and we shall advise the Home Secretary that the probation order is bad, which will probably mean that the petitioner will be released. It is only fair to say that the offence was not serious; it was drunkenness. It is also fair to say that he said that he came over here to get in touch with the probation officer, and there is reason to believe that that is true.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, JJ.)

July 28, 29, 1958

WHITTINGHAM v. NATTRASS

Case Stated—Notice of appeal—Stating and filing of Case and notice out of time—Power of court to extend time—Need for application supported by affidavit.

PRACTICE NOTE.

Justices, who heard informations against the appellant on Jan. 22 and 27, 1958, stated a Case on May 8, 1958. During the hearing before the Divisional Court, it appeared (a) that no application had been made to the court to extend the statutory time limit (three months) within which the Case should have been stated, but was not, and (b) that the appellant had purported to extend the times, laid down in R. S. C. Order 59, r. 33 (ten days and fourteen days respectively), within which a Case stated must be lodged, after having been received, and within which notice of appeal must be served on the respondent, by obtaining and filing a consent order in the Crown Office in accordance with a statement in the notes to r. 33 as set out in the ANNUAL PRACTICE. The matter is noted on the directions given by LORD GODDARD, C.J., hereunder.

LORD GODDARD, C.J.: Since the court rose yesterday evening we have had an opportunity of looking into this matter, and the position is this. In the first place, if magistrates do not state the Case within the statutory time, viz. within three months of the application therefor, the court has power to extend the time, but an application to extend the time must be made and reasons must be shown why the court should extend the time because, if the failure of the magistrates is due to the fault of the applicant, the court will not as a rule extend the time. No application was made in this case to extend the time. Secondly, the matter was not set down within ten days after receiving the Case; the Case was not lodged at the Crown Office, and the Rules of the Supreme Court provide that it shall be lodged within ten days and that within fourteen days after receiving the Case a notice of appeal is to be served on the respondent. Those dates were ignored. There is a statement in Griffiths' GUIDE TO CROWN OFFICE PRACTICE, p. 66, that that can be remedied by a consent order being filed in the Crown Office, but the court knows of no authority for that. Consents cannot be filed to set aside the rules of court in that way. The court has power to extend the time if proper grounds are shown, but an application must be made to the court to extend the time. It cannot be done by consents filed in the Crown Office. We could have extended the time for the magistrates to state the Case. That has been done and no objection has been taken by the other side about that. We can extend the time for lodging the Case. An affidavit ought to have been filed explaining the delay and asking the court to exercise its power. The court will exercise the power, but I hope that in future it will be understood that consents cannot be filed to set aside the rules of court. It is most important for the reasons given in *Ripington v. Hicks and Son (Oxford), Ltd.* (1), that these appeals from magistrates should come on promptly and should not be delayed in this way. If extension of time is desired, application should be made to the court; time cannot be extended by consent.

G.F.L.B.

(1) 113 J.P. 121; [1949] 1 All E.R. 239.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DONOVAN AND ASHWORTH, J.J.)

July 28, 29, 30; August 20, 1958

SMITH & OTHERS v. WILES

Licensing—Gaming on licensed premises—Lawful lottery—Effect of exemption from illegality under Betting and Lotteries Act, 1934—Licensing Act, 1953 (1 & 2 Eliz. 2, c. 46), s. 141 (1)—Small Lotteries & Gaming Act, 1956 (4 & 5 Eliz. 2, c. 45), s. 1.

The licensee of a public house was also president of a club registered under the Small Lotteries & Gaming Act, 1956. With the knowledge and approval of the licensee, a small lottery was conducted on behalf of the club on the licensed premises in a manner complying with s. 1 of the Act, and the lottery, accordingly, was not an illegal lottery. Tickets were sold at sixpence each, the purchaser selecting two numbers between one and twenty, and subsequently a draw was made by placing in a canister balls numbered from one to twenty, revolving the canister, and then releasing two balls. The ticket holder whose number corresponded to those on the released balls was entitled to a prize. The licensee was convicted of suffering gaming to be carried on on licensed premises, contrary to s. 141 of the Licensing Act, 1953, and two officers of the club were convicted of aiding and abetting the licensee.

HELD: that the convictions were right because (per LORD GODDARD, C.J.) participating in any lottery was gaming, and (per DONOVAN and ASHWORTH, J.J.) participating in the particular lottery in question amounted to gaming, and the Small Lotteries & Gaming Act, 1956, did not create any exemption from liability under s. 141 of the Licensing Act, 1953.

Per DONOVAN and ASHWORTH, J.J.: The defence provided by s. 22 (2) of the Betting and Lotteries Act, 1934, is available in the case of a lottery exempted from illegality by s. 1 or s. 4 of the Act of 1956.

CASE STATED by the stipendiary magistrate for Birmingham.

The licensee of a public house was also president of a bowling club registered under the Small Lotteries and Gaming Act, 1956. A small lottery was conducted on behalf of the club on two occasions on the licensed premises in manner complying with s. 1 of the Act of 1956. The method of carrying out each lottery was by the sale of sixpenny tickets on the purchase of which the purchaser selected two numbers each between one and twenty; subsequently a draw was made by placing in a canister balls numbered from one to twenty, revolving the canister and releasing from it one ball and then another. The ticket holder whose numbers corresponded to those on the released balls was entitled to a prize. The licensee was convicted on informations charging him with two offences of suffering gaming to be carried on on licensed premises, contrary to s. 141 (1) of the Licensing Act, 1953. Two other officers of the club were convicted on informations charging them with aiding and abetting the licensee. The licensee and the officers of the club appealed.

Sir Frank Soskice, Q.C., and S. Brown for the appellants.

Wingate-Saul for the respondent.

Cur. adv. vult.

Aug. 20. The following judgments were read.

ASHWORTH, J.: This is an appeal by way of Case Stated from a decision of the learned stipendiary magistrate for the City of Birmingham whereby he convicted the appellant Smith of two offences against s. 141 (1) of the Licensing Act, 1953, and the appellants Barnes and Bishop of aiding and abetting those offences. The appellant Smith was at all material times the licensee of a public house known as the Deer's Leap and situate at Kingstanding in the City of Birmingham, and it was alleged against him that on Nov. 24 and again on Dec. 1, 1957, he suffered gaming to be carried on on his licensed premises. The three

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appellants were at all material times the President, Vice-President and Secretary respectively of a bowling club known as the Deer's Leap Bowling Club, and the headquarters of the club were situate at the licensed premises. In October, 1957, the club was duly registered under the provisions of the Small Lotteries and Gaming Act, 1956 (hereinafter referred to as the Act of 1956) for the purpose of promoting a lottery in accordance with that Act. The three appellants are all men of excellent character and repute.

On Nov. 22, 23 and 24, 1957, the appellants Barnes and Bishop sold a number of sixpenny tickets for a lottery promoted by the club: these sales took place in the bar of the Deer's Leap and the appellant Smith saw and approved such sales. On the evening of Nov. 24 a draw took place under the supervision of the appellant Barnes in the smoke room of the Deer's Leap, the method adopted involving the use of a canister containing table tennis balls and the release therefrom of two numbered balls. The holder of the lottery ticket who had selected on purchase the combination of the two numbers which corresponded with those on the two balls released from the canister was entitled to a prize. On Nov. 30, 1957, in the Deer's Leap the appellants Barnes and Bishop again sold tickets for a lottery promoted by the club and a draw was made on Dec. 1 in the manner described above. The appellant Smith knew and approved of the draw taking place. Each of the two lotteries was conducted by the appellants Barnes and Bishop on behalf of the club and in aid of the club funds.

The decision of the learned stipendiary magistrate was expressed in the following words:

"I was of opinion that what took place in this case, whether it is called a lottery or a sweepstake or is regarded as more analogous to such a game as roulette where the player selects the number he wishes to back, was undoubtedly gaming."

This decision was challenged on two main grounds: first, it was said that on the facts the events which took place at the Deer's Leap could not properly be regarded as gaming; secondly, it was said that even if the holding of such a lottery as is referred to in s. 1 of the Act of 1956 does amount to gaming, the effect of that Act and the Betting and Lotteries Act, 1934 (hereinafter referred to as the Act of 1934) is to render such gaming when it occurs on licensed premises not an offence within the scope of s. 141 of the Licensing Act, 1953.

The first of these submissions involves the problem of what is meant by gaming. There appears to be no statutory definition of the word and, although there are many reported cases in which the meaning of the word has been considered, I am not for my part satisfied that there is to be found in any of them a definition which can be applied generally. Counsel for the appellants contended that gaming involves something in the nature of a game in which the players not only participate but participate continuously: accordingly it was submitted that a person who buys a lottery ticket on a given day when the draw is not due to take place until one or more days have elapsed and the purchaser of the ticket may well be absent, is not gaming. In my judgment this contention places too restricted a meaning on the word "gaming". Undoubtedly some games involve gaming, but it does not follow that gaming involves a game. Moreover I do not think that the time factor enters into the problem in the way suggested on behalf of the appellants. It was conceded that persons who play roulette are gaming; they are staking their money in a proceeding the outcome of which is dependent merely on chance. Like the learned stipendiary magistrate, I take the view that there is no difference in principle between that form of proceeding and the one involved in the present case, where the stake is represented by a ticket and

the outcome is dependent on two numbered balls released from a canister and not one ball spun on a roulette board.

It is true that in places the relevant statutes appear to draw a distinction between lotteries and gaming: for example, in s. 24 (1) (a) of the Act of 1934 reference is made to "purposes not connected with gaming, wagering or lotteries". Moreover, in the Act of 1956, lotteries and gaming parties are treated separately. But in my view these provisions do not justify the inference that lotteries and gaming are, so to speak, mutually exclusive terms. The truth is that some lotteries involve gaming and some do not, just as some gaming involves a lottery and some does not. The facts of each case relating to a lottery require separate consideration in order to determine whether that lottery constitutes gaming or not.

In the course of the argument reference was made to *Morris v. Baguley* (1), a decision of this court given in 1937 in which the problem now under consideration was raised. There is no properly authenticated report of the decision but it is mentioned in the *Brewing Trade Review Law Reports* for that year [at p. 73]. The original Case Stated was obtained from the Crown Office and from that document it was clear that the question raised for the consideration of this court was whether the drawing of a sweepstake constituted gaming. The drawing took place on licensed premises and the licensee was charged with having suffered gaming to be carried on on his licensed premises contrary to s. 79 of the Licensing (Consolidation) Act, 1910. The justices held that gaming had not taken place and the informant appealed. It was held by this court that gaming had in fact been suffered on licensed premises. It is only right to add that the respondent licensee was not represented at the hearing of the appeal.

On the question, therefore, whether the drawing of a sweepstake or lottery constitutes gaming, that case appears to be a decision directly in favour of the present respondent and counsel for the appellants sought to avoid its consequences by contending that it was not binding on this court for one of the reasons given in *Young v. Bristol Aeroplane Co., Ltd.* (2) and applied in *Huddersfield Police Authority v. Watson* (3), namely, that it was given per incuriam. I can see no reason why the decision in *Morris v. Baguley* (1) should be so regarded, and, quite apart from any views of my own, I should feel bound by it; but, as already indicated, I have come to the same conclusion independently, and, in my view, the first submission of the appellants fails.

The second submission involves consideration of the relevant statutory provisions. It is convenient to start with the Act of 1934. Section 21 provides that subject to the provisions of Part 2 of the Act all lotteries are unlawful. Section 22 (1) contains a list of offences in connexion with lotteries of which para. (f) is of particular relevance:

"uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery."

Section 22 (2) provides that in any proceedings instituted under the preceding sub-section it shall be a defence to prove that the lottery was such a lottery as is declared by any subsequent section of Part 2 not to be an unlawful lottery. Sections 23 and 24 each contain provisions whereby lotteries falling within their limited scope are deemed not to be unlawful lotteries. I shall refer to such lotteries as exempted lotteries.

(1) [1937] *Brewing Trade Review Law Reports* 73.

(2) [1944] 2 All E.R. 293; [1944] K.B. 718; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163.

(3) 111 J.P. 463; [1947] 2 All E.R. 193; [1947] K.B. 842.

It may be noted that the Act of 1934 contained no specific provision relating to licensed premises. Accordingly, a licensee on whose premises a lottery was conducted might be charged with a contravention of s. 22 (1) (f), unless the lottery was an exempted lottery. Further, if the lottery involved gaming and was conducted on his premises, he might also be charged with a contravention of the Licensing (Consolidation) Act, 1910, as was in fact done in *Morris v. Baguley* (1). The next relevant Act is the Licensing Act, 1953, but in my view there is no material difference between s. 141 of that Act and s. 79 of the Licensing (Consolidation) Act, 1910, and I need not refer to the terms of either section in detail.

The Small Lotteries and Gaming Act, 1956, is, however, of great importance. By virtue of s. 1 certain small lotteries conducted for charitable, sporting or other purposes are deemed not to be unlawful lotteries, providing certain conditions are observed. Section 4 deals with a limited class of entertainments at which games of chance or of chance and skill combined are played and by sub-s. (2) provides that places where such entertainments are held shall not be deemed to be common gaming houses. Sub-section (3) provides that a game played at an entertainment to which the section applies in accordance with the prescribed conditions shall not be deemed to be an unlawful lottery. If one analyses the position at this stage, the result is that there have been two additions to the pair of exempted lotteries mentioned in s. 23 and s. 24 of the Act of 1934. These additions are a small lottery falling within s. 1 of the Act of 1956 and a game played at an entertainment falling within s. 4. But a person who used premises or permitted premises to be used for either of these additional lotteries would still have been liable to prosecution for an offence under s. 22 (1) (f) of the Act of 1934, as the defence provided by s. 22 (2) is only applicable in the case of lotteries declared not to be unlawful by any subsequent section in Part 2 of that Act. In order to meet this situation the draftsman provided a somewhat oblique remedy by including in s. 5 of the Act of 1956 a provision that the Act of 1934 should have effect as if s. 1 and s. 4 of the Act of 1956 were included in Part 2 of the Act of 1934. The defence provided by s. 22 (2) of the Act of 1934 is, therefore, available in the case of the additional exempted lotteries.

It is now necessary to consider the effect of sub-s. (6) of s. 4 of the Act of 1956 which provides:

"Nothing in this section shall be construed as affecting the operation of any of the following enactments, that is to say—(a) s. 141 of the Licensing Act, 1953 . . ."

The inclusion of this provision in this section and the omission of any corresponding provision in s. 1 of the Act of 1956 are the points on which I have felt most doubt. If it was the intention of the legislature to maintain the full force and effect of s. 141 in relation to exempted lotteries and to dispel any doubts as to its applicability, one might have supposed that the Act of 1956 would contain a separate section: Nothing in this Act shall be construed as affecting the operation of s. 141. Furthermore, the explanation that sub-s. (6) was included in s. 4 ex majore cautela is not very convincing, since s. 1 would appear to call for the same degree of caution. On the other hand, I find no less difficulty in accepting counsel for the appellants' contention that by implication s. 141 is rendered inapplicable to lotteries falling within s. 1 of the Act of 1956. The omission of any reference to s. 141 in s. 1 of the Act of 1956 may be said to afford some support for the contention that lotteries within s. 1 do not involve gaming and therefore no reference to s. 141 was called for, but I have already stated my

(1) [1937] *Brewing Trade Review* Law Reports 73.

conclusion that such lotteries may (and in the present case did) involve gaming. For my part I am not prepared to take the further step of deducing, from the omission of any reference to s. 141 in s. 1 of the Act of 1956, that s. 141 ceased to apply to the gaming (if any) involved in a lottery under that s. 1.

Although I do not feel confident on the point, I am inclined to think that the draftsman treated lotteries falling within s. 1 of the Act of 1956 on the same basis as the lotteries exempted under s. 23 and s. 24 of the Act of 1934: no special reference to the provisions of the Licensing (Consolidation) Act, 1910, had been thought necessary in regard to those exempted lotteries, and therefore none was required in respect of the lotteries exempted under s. 1 of the Act of 1956 which are lotteries properly so called. On the other hand, s. 4 was introducing something different, namely, the exemption of gaming parties which might or might not be lotteries, and in respect of these a reference to s. 141 was thought to be necessary.

Whatever may be the true explanation, I am of opinion that once it is established that gaming is involved, a licensee cannot lawfully suffer it to take place on his licensed premises. In my judgment, s. 141 of the Licensing Act, 1953, was not affected by the Act of 1956, and accordingly this appeal should be dismissed. DONOVAN, J., has authorised me to say that he agrees with this judgment.

LORD GODDARD, C.J.: I agree that this appeal fails. I have come to this conclusion by a shorter route, as, in my opinion, the only question that falls for decision is whether the conduct of a lottery is a form of gaming. If it is, in my opinion it cannot be conducted on licensed premises although it is one which otherwise would be exempted from penalties. The legislature has always been at pains to prohibit public houses being used for the purpose of gambling whether by betting or gaming, and in my opinion s. 4 (6) of the Small Lotteries and Gaming Act, 1956, is intended to maintain this absolute prohibition, notwithstanding that a particular form of gaming for particular purposes is exempted from penalties if conducted elsewhere. Apart from authority I think that participating in a lottery is gaming and I agree with the learned stipendiary that it is analogous to a game of roulette. In the one case the player buys a numbered ticket which if drawn gains a prize, in the other he chooses a number on a board and if the ball stops at that number he wins. If the latter is gaming, and no one could argue the contrary, I cannot see why the former is not. Moreover, the decision in *Morris v. Baguley* (1) is directly in point; the short report to which our attention was called [(1937) *Brewing Trade Review* 73] does not appear to have been reported by a member of the Bar and apparently it was only argued on one side. But we sent for the Case Stated, from which it is clear that the only question submitted was whether the drawing of a lottery was gaming, and that this court held that it was. Even if I did not agree with the decision, I should feel I was bound by it. That case was decided after the Betting and Lotteries Act, 1934, had been passed, and in my opinion is conclusive, as indeed I understood counsel for the appellants to agree that it was, if we were of opinion that it was binding on us. I agree that the lottery with which this case deals falls within the exemptions conferred by the Act of 1956, but the prohibition of gaming on licensed premises still remains, so to gain immunity it must be conducted elsewhere. It is true that the Act deals with both lotteries and gaming, but, though lotteries (of which a sweepstake is a common example) are only one form of gaming, carried out by the drawing of a numbered ticket, if Parliament had intended to make so startling a departure from its previous policy as to allow

(1) [1937] *Brewing Trade Review* Law Reports 73.

lotteries of any description in public houses while still prohibiting other gaming, I should have expected some very clear words to effect such a change.

Before parting with this case I should like to say, as I have said on other occasions, that I think that it is unfortunate that decisions of this court on matters relating to criminal law can never be the subject of appeal. I feel no doubt as to the correctness of the decision in *Morris v. Baguley* (1), but supposing that we had felt that it was wrong or at least open to question, we should none the less be bound by it. It does happen from time to time that this court has to follow a decision with which they find it difficult to agree, and if their decision were open to appeal both the instant case and that which it followed could be reviewed. I continue to hope that the time will come when by leave, and subject perhaps to terms as to costs, it will be possible to take either to the Court of Appeal or perhaps direct to the House of Lords a decision of this court although it relates to a criminal cause or matter. The complexity of modern legislation, I feel sure, makes this desirable.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Colin Langley & Smith*, Edgbaston;
Sharpe, Pritchard & Co., for *M. P. Pugh*, Birmingham.

T.R.F.B.

(1) [1937] *Brewing Trade Review Law Reports* 73.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., CASSELS AND STREATFIELD, JJ.)

October 6, 7, 1958

R. v. GOVERNOR OF H.M. PRISON, BRIXTON.

Ex parte MINERVINI

Extradition—Habeas Corpus—Right of representative of requisitioning government to be heard—Crime alleged to have been committed in Norwegian ship—No evidence with regard to position of ship—Extradition Act, 1870 (33 & 34 Vict., c. 52), s. 25.

Where an alleged criminal has been committed to prison pending extradition, the representative of the requisitioning government may be directed to be served under R.S.C., Ord. 59, r. 17, with notice of motion for habeas corpus on behalf of the alleged criminal, and may be represented and heard on the motion. Where this course had not been taken, but the requisitioning government had instructed counsel who was present in court on the hearing of the motion,

Held: that the court would hear counsel for the requisitioning government should the occasion arise.

An Italian seaman, one M., was alleged to have murdered a fellow seaman on board a Norwegian ship, and had been committed to prison to await extradition. No evidence had been given before the committing magistrate of the position of the ship at the time of the alleged crime. Article 1 of the Extradition Treaty of 1873 with Norway provided: "The High Contracting Powers engage to deliver up to each other those persons who, being accused or convicted of a crime in the territory of the one party, shall be found within the territory of the other party. . . ." Article 2 specified the crimes to be treated as extradition crimes, number 17 being "assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm." M. applied for habeas corpus on the ground that there was no evidence that the alleged crime had been committed within the territory of the Norwegian government, and that, therefore, it was not extraditable.

Held: that in the treaty the word "territory" was synonymous with "jurisdiction"; the alleged crime was within the jurisdiction of the Norwegian government wherever the ship was; and, therefore, the motion failed.

MOTION for habeas corpus.

The applicant, Onofrio Minervini, an Italian subject, was arrested for the alleged murder of a fellow seaman on board the motor tanker Vanja, sailing under the Norwegian flag, and was committed to Brixton Prison on Aug. 25, 1958, by the chief magistrate at Bow Street to abide an order of extradition made by the Secretary of State. The master of the ship stated in his affidavit that the ship was six days' sailing from port when the alleged crime was committed, but no evidence was given as to the exact position of the ship at the time. By art. 1 of the Extradition Treaty of 1873 with Norway it was provided:

"The High Contracting Powers engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party . . ."

Article 2 listed the crimes which should be treated as extradition crimes, number 17 being "assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm". The applicant applied for the issue of a writ of habeas corpus.

Caplan, Q.C., and *L. J. Verney* for the applicant.

R. E. Seaton for the governor of Brixton Prison.

Sir Frank Soskice, Q.C., and *Q. T. Edwards* for the Norwegian government.

Caplan, Q.C., took the preliminary point that the Norwegian government was not entitled to be heard on the motion.

LORD PARKER, C.J.: Counsel for the applicant has raised a matter of principle, namely, whether on an application such as this the requisitioning government is entitled to be heard. We, however, find it unnecessary in the present case to decide that point of principle. We think that under R.S.C., Ord. 59, r. 17, the court has power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court can have the benefit of its views. We think that in the present case it would have been proper and convenient to give such a direction and though no direction was in fact given, the Norwegian government is here, represented by counsel, whom we will hear should the occasion arise.

[THEIR LORDSHIPS then heard argument on the substantive question.]

LORD PARKER, C.J.: The applicant was a seaman on the Norwegian motor tanker Vanja, and he is accused of having murdered one Sigurd Aas on July 20, 1958, on board that vessel. There is no specific evidence as to the geographical position of the vessel at the time when the alleged murder is said to have taken place. All that we know is that it was some six days' steaming from port. The extradition proceedings were started as the result of a request by the government of the Kingdom of Norway under whose flag the Vanja was.

Counsel for the applicant has raised two points in a very careful and ingenious argument. The first one is this: He says that before the learned chief magistrate could have jurisdiction he must be satisfied on certain facts which, if they turned out to be correct, showed that the applicant was accused of an extradition crime, and for that purpose he says that the extradition treaty must be looked at to see if the facts shown before the chief magistrate bring the case within it. The treaty in question here was one made between Queen Victoria and the governments of Sweden and Norway. It was dated June 26, 1873, and pursuant to the Extradition Act, 1870, was made the subject of an Order in Council dated Sept. 30, 1873, applying to it the provisions of the Act of 1870. I should say, to complete the story, that in 1907 there was a further Order in Council applying

the provisions of that treaty of June, 1873, with slight alterations, to the Kingdom of Norway alone.

By art. 1 of the treaty of June, 1873, it was provided as follows:

"The High Contracting Powers engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances and conditions stated in the present treaty."

Counsel for the applicant says that in the ordinary way "territory" and "jurisdiction" are two completely separate notions. "Territory" he would define as an area of the globe consisting of land with the territorial waters adjoining it. That being so, he says that a vessel on the high seas, at any rate outside territorial waters, cannot be in any sense a territory. The difficulty in his way is that when one looks at art. 2 and finds the list of the crimes which are to be treated as extradition crimes, one finds:

"(16) Sinking or destroying a vessel at sea or attempting to do so.
(17) Assaults on board a ship on the high seas, with intent to destroy life or to do grievous bodily harm. (18) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master."

True, in general one would not construe art. 1 or extend the ordinary meaning of art. 1 by reference to art. 2 if it could be avoided. Counsel says that there is no real conflict between art. 1 and art. 2 because the items (16), (17) and (18) to which I have referred can be treated as referring to offences on vessels while within the territorial waters of Norway since, so he says, "high seas" in its ordinary meaning means high seas from low-water mark and therefore would include territorial waters. It seems to me that to read the provisions in that way is just nonsense. It is absurd to think that extradition proceedings will lie if a murder is committed just inside territorial waters and will not lie if it is alleged to have been committed just outside territorial waters. This treaty is not treating "territory" in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the treaty. Indeed, it is to be observed, though it may be said to be an argument the other way, that in many of these treaties reference is made not to territory but to jurisdiction, but, in my view, in this treaty territory is equivalent to jurisdiction. It is also relevant, I think, in this connexion to consider the terms of the Extradition Act, 1870. Counsel for the applicant says quite rightly that the scope of the treaty cannot be enlarged by looking at the Act. With that I entirely agree, but in construing the words of the treaty one is entitled to look at the Act itself, because the two contracting parties in 1873 must have had in mind the Act of 1870 and the fact that an Order in Council would be made referring to the treaty and applying the provisions of the Act. Looking at the Act one finds that s. 25 provides:

"For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state."

That no doubt is a provision for interpreting the Act. It begins with the words "For the purposes of this Act", but nevertheless it seems to me to be a provision which cannot be ignored in considering the meaning of the treaty which was to

be the subject of an Order in Council applying the provisions of the Act. In my view, counsel for the applicant's first argument fails.

The second way in which he puts the case is this: Assuming that he is wrong and that "territory" must be given more than its ordinary meaning, yet it is impossible to say that it covers a ship at sea when it is within the territorial waters of a third Power because he says that that would be a gross breach of international comity; it would not only be legislating in respect of foreign territory, but also would be assuming something which was within that territory to be the territory of another foreign country. In my view, it is quite unnecessary here to consider what is the true position of a ship, whether the country whose flag is flown merely has jurisdiction over the ship and those on board or whether it is to be treated for certain purposes as the territory of that Power; because if I am right in saying that "territory" in art. 1 of the treaty is equivalent to "jurisdiction", then assuming that the ship was at the time of the alleged murder within the territory of a foreign Power, it would be only a matter of competing jurisdiction and no one suggests that it is wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it seems to me that it matters not in this case whether the ship was in the middle of the North Sea, in the territorial waters of Norway, in the territorial waters of this country or in the territorial waters of any other Power; the Norwegian government had jurisdiction, and that is sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position of the vessel and he had jurisdiction to make the order which he did. I would dismiss this application.

CASELS, J.: I agree.

STREATFEILD, J.: I also agree.

Application dismissed.

Solicitors: *Crawley & de Reya; Director of Public Prosecutions; Neil Maclean & Co.*

T.R.F.B.

LOCAL GOVERNMENT REVIEW REPORTS

COURT OF APPEAL

(LORD EVERSHERD, M.R., SELLERS AND PEARCE, L.J.J.)

Re BARON KALMAN DE DEMKO

October 6, 7, 1958

Extradition—Discharge of fugitive—Power of Court of Appeal—Original, not appellate, jurisdiction—Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), s. 10.

On appeal by an appellant from an order of the Divisional Court refusing him relief under s. 10 of the Fugitive Offenders Act, 1881, the Crown raised the preliminary point that the Court of Appeal had no jurisdiction to hear an appeal under the Act of 1881.

Held: by the Act of 1881 the Court of Appeal was given only original jurisdiction, and, therefore, the appeal failed in limine.

APPEAL from order made by the Queen's Bench Divisional Court (DEVLIN, DONOVAN and ASHWORTH, JJ.), refusing to grant the applicant relief under s. 10 of the Fugitive Offenders Act, 1881, and dismissing his application for a writ of habeas corpus. The Crown took the preliminary objection that the Court of Appeal had no jurisdiction to entertain the appeal.

Lauton, Q.C., and Merriton for the applicant.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), Rodger Winn and B. T. Wigoder for the Secretary of State for Home Affairs and the governor of Brixton Prison.

J. C. Phipps for the High Commissioner for the Union of South Africa.

LORD EVERSHERD, M.R.: This is an appeal from an order made by the Divisional Court of the Queen's Bench Division on July 14, 1958. The order reads:

"Upon the application of Baron Kalman de Demko for leave to issue a writ of habeas corpus ad subjiciendum and for relief pursuant to the Fugitive Offenders Act, 1881, s. 10. And upon hearing [counsel] . . . And upon reading [evidence] . . . no order is made pursuant to the said Act and the application that a writ of habeas corpus ad subjiciendum do issue is hereby refused . . ."

My reading of the order sufficiently indicates the nature of the application. The greater part of the judgment of DEVLIN, J. (which was the leading judgment in the Queen's Bench Division) dealt with and was related to the application under the Fugitive Offenders Act, 1881. It appears that the applicant had been charged with certain offences, and the learned judge said that one of them could not in any circumstances be suggested as trivial. He, therefore, concluded that it would not be unjust or oppressive that the applicant should be required to return to South Africa in order to stand his trial, and he did not think that the lapse of time since the alleged offences substantially altered the result.

The notice of appeal is dated July 29, 1958, and we agreed yesterday that we should expedite the appeal since it was a matter involving the liberty of the individual. Counsel for the applicant has not pressed that part of his original application which asked for leave to issue a writ of habeas corpus. He accepts that it must be taken now as clearly decided, by authorities binding on this court; see, for example, *Ex p. Woodhall* (1) and *Amand v. Secretary of State for Home Affairs* (2); that the widest construction will be given to the

(1) (1888), 52 J.P. 581; 20 Q.B.D. 832.

(2) [1942] 2 All E.R. 381; [1943] A.C. 147.

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formula "criminal cause or matter" in s. 31 (1) (a) of the Supreme Court of Judicature (Consolidation) Act, 1925, with the result that s. 31 (1) of the Act of 1925 makes it plain that we have in this court no jurisdiction to entertain an appeal from a decision of the Divisional Court refusing leave to issue a writ of habeas corpus. But counsel for the applicant pressed his application under s. 10 of the Fugitive Offenders Act, 1881, which (as he rightly observed) has not been the subject of any direct authority binding on this court. The Solicitor-General, for the Governor of Brixton Prison, has taken the preliminary objection that s. 31 (1) of the Act of 1925 applies to an appeal, or a purported appeal, under the Fugitive Offenders Act, 1881, so that we in this court have no more jurisdiction to entertain such an appeal than we have to entertain an appeal in relation to the habeas corpus application.

In my judgment, the preliminary objection is well-founded. I turn first to the Fugitive Offenders Act, 1881, itself. It is not in doubt that the alleged offences with which the applicant has been charged are within the scope of the Act and form the subject of the phrase a "criminal cause or matter". Section 10 of the Act provides:

"Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

The phrase "superior court" is defined in s. 39 of the same Act, which provides:

"The expression 'superior court' means: (1) In England, Her Majesty's Court of Appeal and High Court; and (2) In Scotland, the High Court of Justiciary . . ."

The argument of counsel for the applicant is, briefly, as follows. Since by the express language of the definition section the Court of Appeal is included in the phrase "superior court" and, therefore, given jurisdiction, that jurisdiction must be, or at least include, the function which that court normally performs—namely, the function of hearing appeals. In support of that general proposition, counsel referred (for example) to the language of LORD PARKER OF WADDINGTON in *National Telephone Co., Ltd. v. Postmaster-General* (1), where LORD PARKER said:

"Where by statute matters are referred to the determination of a court of record with no further provision, the necessary implication is, I think, that the court will determine the matters, as a court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

As I have referred to that passage, I should add, in regard to it, that the real question before the House in *National Telephone Co., Ltd. v. Postmaster-General* (1) was whether the Railway and Canal Commission, which had been given jurisdiction as regards certain matters arising under the Telegraph (Arbitration) Act, 1909, was to act in regard to those matters as an arbitrator or as a court. The House decided in favour of the latter view, with the consequence that, in the

ordinary course, an appeal lay from the decision of the commission. To revert to counsel's argument, he added the further, by no means insignificant, point that the original jurisdiction of the creature of statute, namely, the Court of Appeal, is of an extremely limited character: see, for example, the notes to R.S.C., Ord. 58, r. 1, in the ANNUAL PRACTICE, 1958, p. 1651.

If the sections of the Fugitive Offenders Act, 1881, which I have read stood alone, and the matter were entirely *res integra*, I think, for my part, that there would be great force in the submissions of counsel for the applicant. But, if he were right in saying that the reference to the Court of Appeal meant, by necessary inference, that it was to exercise, in regard to these matters, its ordinary appellate jurisdiction, then one would not suppose that the Court of Appeal had original jurisdiction in this kind of matter also. As I have said, there is no direct authority binding on this court to the effect that this court has no appellate jurisdiction in these matters; but there is direct authority for the view that this court has an original jurisdiction in these matters. That authority is *R. v. Brixton Prison (Governor), Ex p. Savarkar* (1). The original jurisdiction was also assumed in *Re Henderson, Henderson v. Secretary of State for Home Affairs* (2).

In *R. v. Brixton Prison (Governor), Ex p. Savarkar* (1), an application had been made to the Divisional Court (as in the present case) both for leave to issue a writ of habeas corpus and also under s. 10 of the Fugitive Offenders Act, 1881, the prisoner in question having been committed to prison under the Act of 1881. The Divisional Court had rejected the application, but (as appears clearly from the report) the order in fact drawn up was limited to a refusal to give leave to issue the writ of habeas corpus: it was wholly silent as to the application under s. 10 of the Fugitive Offenders Act, 1881. The prisoner having appealed, the then Solicitor-General, Sir Rufus Isaacs, took the preliminary objection (in much the same way as the present Solicitor-General has done in this case) that this court had no jurisdiction to entertain the appeal or the application at all. His argument ended as follows:

"The present case, it is true, arises under the Fugitive Offenders Act, 1881, under which the appellant has been committed to prison in this country to take his trial in another part of His Majesty's dominions, but no trace is to be found in that Act of an appellate jurisdiction being given to this court, and the principle of the decision in *Ex p. Woodhall* (3) is decisive of the present case."

His argument was countered by Mr. Powell, for the prisoner, and, as reported, Mr. Powell's argument closely reflects the argument of counsel for the applicant in the present case. The argument is thus reported:

"By s. 10 and s. 35 certain powers are given to a 'superior court', which expression is by s. 39 defined to mean 'In England, Her Majesty's Court of Appeal and High Court of Justice'. It must be inferred from this that it was the intention of the legislature to confer upon the Court of Appeal an appellate jurisdiction in the case of applications made under the Act, as the present application was made; there was no other reason for including it in the definition of a superior court."

Mr. Powell then concluded with this submission:

"It is further submitted that under the Act of 1881 the Court of Appeal has both an original and an appellate jurisdiction, and, if necessary, the

(1) [1910] 2 K.B. 1056.

(2) [1950] 1 All E.R. 283.

(3) (1888), 52 J.P. 581; 20 Q.B.D. 832.

court is asked to hear the application under the Fugitive Offenders Act, 1881, in the exercise of its original jurisdiction."

This court, having observed the form of order appealed from, came to the conclusion that the order did not deal at all with the application under the Fugitive Offenders Act, 1881, and, treating it as confined to the application for a writ of habeas corpus, they then proceeded to dismiss the appeal. The learned counsel for the prisoner thereupon made an original application to the Court of Appeal, under the Fugitive Offenders Act, 1881, and Sir Rufus Isaacs sought (persisting in his preliminary objection) to defeat that by saying that, on a true construction of the statutes, an application for a writ of habeas corpus involved the application under the Fugitive Offenders Act, 1881, so that the latter must be treated as having, *sub silentio*, been dealt with by the dismissal of the habeas corpus application. Mr. Powell, on that matter, was not called on.

The leading judgment was delivered by VAUGHAN WILLIAMS, L.J., who said:

"I start with the assumption that, under the Fugitive Offenders Act, 1881, there is concurrent jurisdiction to deal with such an application in each court which comes within the definition of a 'superior court' given by the Act, and therefore we have power to deal with such an application as a court of first instance."

After referring to the definition of "superior court" which gave power to the Court of Appeal to entertain originally the application, VAUGHAN WILLIAMS, L.J., continued:

"This being so, in the absence of anything to qualify the effect of this provision in the rest of the Act, it necessarily gives to each of the courts which come within the category of a 'superior court', as defined by the interpretation clause, jurisdiction to deal with such matters on the same basis, not on the basis that one is a court of first instance and the other is a court of appeal. It appears to me that it cannot be that the Court of Appeal, having regard to the provisions of s. 47 of the Judicature Act, 1873, was intended to exercise appellate jurisdiction in respect of matters arising under an Act dealing entirely with procedure in a certain class of criminal prosecutions."

Later, he said:

"The ultimate conclusion at which I arrive is that the applicant is entitled to make this application to us, first, because an application such as this may be made to any court which comes within the definition of a 'superior court' given by the Fugitive Offenders Act, 1881; and secondly because, assuming that no such application could be entertained after the matter had once been adjudicated upon by a superior court, in my opinion, we must look for such an adjudication in the record of the court . . ."

He then pointed out that the record was silent on the matter. FLETCHER MOULTON, L.J., said:

"In the first place I am satisfied that under s. 10 and s. 35 of the Fugitive Offenders Act, 1881, jurisdiction is given to this court to hear an application of this kind, and that this jurisdiction is a jurisdiction concurrent with that of the High Court, both this court and the High Court being included in the designation 'superior court' by virtue of the definition of that expression in s. 39 of the Act."

FLETCHER MOULTON, L.J., concluded his judgment:

"Therefore it must be taken that the questions raised by the present application have not been heard and decided in proceedings properly raising

them before a court of concurrent jurisdiction; and consequently, without deciding whether, if they had been so heard and adjudicated upon, it would have prevented us from hearing this application, it is open to us to treat the matter as *res nova*, and not *res judicata*."

BUCKLEY, L.J., had taken a somewhat different view of the construction of the Act—a view more in conformity, it is fair to say, with the submission of counsel for the applicant in the present case. He concluded his judgment as follows:

"There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the 'Court of Appeal' as a 'superior court', it means that court sitting as a court of appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what VAUGHAN WILLIAMS, L.J., has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it is a question of very considerable difficulty whether, when this Act speaks of the 'Court of Appeal', it does not mean the Court of Appeal sitting as a court of appeal. It is unnecessary for me to say more as to this point, because the other members of the court do not think that is the meaning. Under these circumstances I do not think that the preliminary objection can be upheld."

What, then, so far as is relevant to this appeal, is the result of that case? I observe that it was decided in 1910 and has not since been the subject of any adverse comment. I think, first, that it provides clear authority (and I have already referred to *Re Henderson* (1)) for the view that, on the true construction of the Fugitive Offenders Act, 1881, the Court of Appeal has original jurisdiction to hear an application under s. 10. I think it also clear that all three judges thought (to say the least) that it was extremely improbable that, by virtue of the definition section and its operation on s. 10, this court could have both original and appellate jurisdiction. VAUGHAN WILLIAMS, L.J., expressly said that in his view it could not have both; and although FLETCHER MOULTON, L.J., reserved the matter, it is, I think, clear enough from the view expressed by BUCKLEY, L.J., that he thought that a choice would have to be made between the one and the other, although, if he had been left to himself, his own choice would have been by way of a preference contrary to that entertained by his colleagues. Third, I think that the case does contain, though no decision, at least indications which are contrary to the argument of counsel for the applicant, and I have, for this purpose, been careful to read the arguments of Sir Rufus Isaacs and Mr. Powell at the beginning of the hearing. I should, therefore, be disposed to think that the proper inferences to be drawn from *R. v. Brixton Prison (Governor), Ex p. Savarkar* (2) are such as should guide us to decide this case in the way which the Solicitor-General contended. In any event, given that there is to be taken as conferred by s. 10 of the Fugitive Offenders Act, 1881, an original jurisdiction on this court (as we must assume), then I conclude clearly that we cannot have also appellate jurisdiction.

I base that conclusion, briefly, on these steps. First, it is a necessary premise to the argument of counsel for the applicant that, there being no express grant of appellate jurisdiction, we must find it in the inferences to be derived from the

(1) [1950] 1 All E.R. 283.

(2) [1910] 2 K.B. 1056.

definition. In other words, to use counsel's language, if one finds jurisdiction given to what is a court of appeal, then there is pregnant in that conferred jurisdiction the notion of appellate functions. Against that submission it must be borne in mind that the Act of 1881 succeeded by eight years the passage of the Supreme Court of Judicature Act, 1873. That was the Act which consolidated into a single Supreme Court the various courts which had up to then been distinct—the Court of Chancery, the Court of Exchequer, the Court of Queen's Bench, and so forth—and created, as part of the Supreme Court, this court, the Court of Appeal. The jurisdiction and functions of the Court of Appeal are dealt with in the appropriate sections of the Act of 1873, and I can confine myself to a reference to one, namely, s. 47, which provides:

"The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the justices of either Bench and the barons of the Exchequer by [the Crown Cases Act, 1848] shall and may be exercised after the commencement of this Act by the judges of the High Court of Justice, or five of them at the least [including certain named ones]. The determination of any such question by the judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under [the Crown Cases Act, 1848]."

If that section is borne in mind, it seems to me no longer true to say, necessarily, that a reference to the Court of Appeal in such a context as is found in the Fugitive Offenders Act, 1881, connotes or carries with it the notion of the exercise of appellate function. The Court of Appeal was a creature of statute then only a few years old; and in the statute which created the Court of Appeal it had been clearly laid down that in regard to criminal causes or matters no appeal should lie to it: it should have no appellate jurisdiction or function.

The matter, however, does not entirely rest there. I think, for my part, that indications supporting that view are to be found in the Fugitive Offenders Act, 1881, itself. They may be slight, but they point, I think, in the same direction. One is to be derived from s. 6 of the Act of 1881. That section reads:

"Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case . . ."

I agree with the Solicitor-General that that is a form of words which does not, on the face of it, seem to fit at all readily with the notion that there might be an appeal from one part of the "superior court" to another. And if one looks at the definition itself, it is "... 'superior court' means: (1) in England, Her Majesty's Court of Appeal and High Court . . ." I should have thought that, if it had been intended by this somewhat oblique method to confer on, or to indicate an appellate jurisdiction in, the Court of Appeal, it would have been much more natural to have reversed the order and said "the High Court and the Court of Appeal". For what it is worth, it is to be noted that no definite article appears before "High Court". I, therefore, read the relevant definition of "superior court" as merely synonymous with "the Supreme Court of Judicature" established by the Act of 1873 and without having any reference in it, implicit or otherwise, to an appellate jurisdiction conferred on part of that court. Counsel for the applicant referred to the fact that there is no similar

distinction, in the reference to the High Court of Justiciary in Scotland, between the Outer House and the Inner House. I do not, however, think that that matter carries any weight in the context. Those are the reasons, therefore, which have persuaded me that, apart from any implications of *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* (1), the right answer is that, given original jurisdiction in this court, we have not got at the same time appellate jurisdiction.

There remains, finally, the Supreme Court of Judicature (Consolidation) Act, 1925. Counsel for the applicant referred first to the language of s. 26, which appears under the heading "Jurisdiction of the Court of Appeal". Section 26 provides:

"(1) The Court of Appeal shall be a superior court of record.

(2) There shall be vested in the Court of Appeal . . . (d) All jurisdiction which, under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act, was immediately before the commencement of this Act vested in or capable of being exercised by the Court of Appeal constituted by the Act of 1873."

In those words, counsel for the applicant finds secreted (if I may use the word without offence to his argument) a reference to the jurisdiction (he says the appellate jurisdiction) conferred by s. 10 of the Fugitive Offenders Act, 1881, which, therefore, is expressly preserved. Section 31 (1) of the Act of 1925 reads:

"No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter . . ."

Counsel says that the three words "or this Act" refer back to s. 26 (2) (d), so as to preserve the appellate jurisdiction of this court in cases under the Fugitive Offenders Act, 1881. The argument is, if I may say so, ingenious, but I find it not persuasive. One has to begin by the consideration that the Act of 1925 is expressed to be a consolidating Act, and one does not look for substantial changes in the law, or the jurisdiction, in a consolidating Act—and one certainly would not be astute to find them in language so extremely obscure as that which I have read, if it is to be applied for this purpose. Indeed, in remembering that this is a consolidation Act one has also to remember that Parliament must be taken to have been aware of the decisions of the courts in the meantime, and particularly of the decision in *R. v. Brixton Prison (Governor)*, *Ex p. Savarkar* (1) in 1910.

I have already indicated that, if this argument were to prevail, it would appear that the draftsman had preserved the right in language more obscure and oblique than one would think possible. In truth, the plain language of the section seems to me to be in entire conformity with the argument of the Solicitor-General. The words "or this Act" in s. 31 (1) (a) of the Act of 1925 have a context and an application in another section, s. 29, of the Act and thus are not left, so to speak, entirely in the air. Indeed, reading them as I do according to their ordinary sense, I think that the Act of 1925 rather confirms and supports the implications which I have drawn from the earlier legislation than otherwise. For these reasons, I think that the preliminary objection here must prevail, and that we must hold in this matter that we have no jurisdiction to entertain an appeal. I would, therefore, dismiss the appeal on that ground.

SELLERS, L.J.: I too would uphold the submission of the learned Solicitor-General that this court has no jurisdiction to entertain this appeal. I agree so fully with the reasons given by my Lord that I do not propose to reiterate them in less impelling words of my own. Although many attempts have been made to persuade this court that it should hear appeals from decisions in habeas corpus proceedings, they have been consistently refused where the matter has been one of a criminal nature or relating to a criminal cause or matter. This is the first time that an attempt has been made to persuade this court that it has a power and duty to hear an appeal under s. 10 of the Fugitive Offenders Act, 1881—and the period of time from 1881 to the present is a considerable one: the first time notwithstanding that in 1910 **BUCKLEY, L.J.**, raised the question and expressed his view on the matter as my Lord indicated in his judgment. Forty years after 1910 this court did in fact, in *Re Henderson, Henderson v. Secretary of State for Home Affairs* (1), hear a case on an original application to it under s. 10. The Fugitive Offenders Act, 1881, and, in particular, s. 39 thereof, makes it clear that this court has some jurisdiction. It has been held in 1910, and acted on since, that that jurisdiction is an original jurisdiction. Unless it can be said that there can be a dual jurisdiction, both original and appellate, then that decision as far back as 1910, and existing unchallenged up to the present time, would establish that the jurisdiction has already been decided to be original and would be binding on this court. On the reasoning which my Lord has advanced and on the argument on which the learned Solicitor-General relied, it does not seem possible, in my view, to say that the jurisdiction given to this court was a dual one. For my part (and this is why I have ventured to make one or two observations in addition to those of my Lord), if the matter were to come afresh, I think that my view would be that I should agree with the views taken by **VAUGHAN WILLIAMS** and **FLETCHER MOULTON, L.JJ.**, that the proper interpretation of the words which have been relied on gives an original jurisdiction, and not an appellate jurisdiction, to this court. It may seem, in the light of what had taken place only a few years before—that criminal matters were excluded from the purview of this court—a little strange, perhaps, that such original jurisdiction should be given, but I think that it would be even more strange if the statute were to give, in such words as exist for our consideration, an appellate jurisdiction, even though limited, in those matters which have been so clearly excluded. I only add these few observations in support of the judgment which my Lord has given.

PEARCE, L.J.: I agree with all that my Lords have said.

Appeal dismissed.

Solicitors: *Beach & Beach; Director of Public Prosecutions; Jaques & Co.*
F.G.

Eng Rev

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., CASSELS AND STREATFEILD, JJ.)

October 9, 10, 1958

R. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte*
RANK ORGANISATION, LTD.

Town and Country Planning—Purchase notice—Refusal by Minister to confirm—Permission for development of another kind in lieu of confirmation—Development contemplated not within sch. 3 to Town and Country Planning Act, 1947—Decision of Minister ultra vires—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 19 (2), s. 19 (2A) (added by Town and Country Planning Act, 1954 (2 & 3 Eliz. 2, c. 72), s. 70).

The applicants, who were the lessees of a vacant site, applied to the local planning authority for permission to build shops with living accommodation over them. On the application being refused, the applicants served on the local planning authority a purchase notice under s. 19 (1) of the Town and Country Planning Act, 1947. The Minister of Housing and Local Government refused to confirm the purchase notice, but, in lieu of confirmation and in purported exercise of his powers under s. 19 (2) (b) of the Act of 1947, as amended by s. 70 of the Town and Country Planning Act, 1954, directed that, in the event of an application being made in that behalf, permission should be granted for residential development of the land. Residential development was not development of a class specified in sch. 3 to the Act of 1947, and the applicants applied for certiorari to quash the Minister's decision on the ground that it was ultra vires.

HELD: that the new sub-s. (2A) of s. 19 of the Act of 1947 applied to the whole of the preceding sub-s. (2), including proviso (b), and, therefore, under proviso (b) the only development for which the Minister could direct permission to be granted in lieu of confirming a purchase notice was development within sch. 3 to the Act of 1947; development in this connection appeared to be limited to physical development; and as the development for which permission had been directed to be granted in the present case was not development within sch. 3, the Minister's decision was ultra vires and certiorari to quash it must issue.

MOTION for certiorari.

The applicants, the Rank Organisation, Ltd., were the lessees for a term of ninety-nine years commencing in 1937 of a piece of land, about an acre in area, in the borough of Ilford. The land was at all material times a vacant site and could not be developed by carrying out development of any class within sch. 3 to the Town and Country Planning Act, 1947. The applicants applied to the local planning authority for planning permission to build shops with living accommodation over. This application having been refused, they served on the Ilford Borough Council a purchase notice under s. 19 (1) of the Town and Country Planning Act, 1947. After a hearing before an inspector of the Ministry of Housing and Local Government the Minister decided, in exercise of powers under s. 19 (2) (b) of the Town and Country Planning Act, 1947, to direct that permission should be granted, in the event of an application being made in that behalf, for the residential development of the land. He did not confirm the purchase notice. His formal decision was issued by letter dated Dec. 19, 1957. The Minister had previously stated in a letter dated Nov. 14, 1957, that the condition specified in s. 19 (1) (a), viz, that the land had become incapable of reasonably beneficial use in its existing state, was satisfied, but he did not state whether he was satisfied that the condition specified in s. 19 (1) (c) had been fulfilled. Residential development of the land was not development of a class specified in sch. 3 to the Act of 1947. The applicants applied for certiorari to quash the decision of the Minister on the ground that in coming to his decision the Minister was acting without, or in excess of, his jurisdiction.

Wilson, Q.C., and Neligan for the applicants.

Rodger Winn for the Minister.

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LORD PARKER, C.J.: The applicants, the Rank Organisation, Ltd., are ground lessees of a site adjoining Eastern Avenue in the borough of Ilford of about an acre in extent having a frontage of some 150 yards to Eastern Avenue and a depth of some thirty-five yards. Apparently it was at one time agricultural land, but it is now bordered by the road and surrounded with development and is referred to as an undeveloped site. In March, 1957, the applicants applied to the local planning authority for planning permission to build shops with living accommodation over. In June, 1957, that application was refused. Thereon the applicants had certain rights as set out in s. 19 of the Town and Country Planning Act, 1947. Provision is there made that, if planning permission has been refused and the applicant can satisfy the Minister of certain conditions the local authority will have to buy the land. An applicant who thinks that he can fulfil the conditions serves a purchase notice on the local planning authority and the local planning authority then transmit that notice to the Minister. If the Minister is satisfied that the conditions are fulfilled, he must confirm the notice, subject to two provisos which are relevant here. One is that he may say that the applicants, notwithstanding the refusal of the local planning authority, can develop as they wish, or he can say that some other development which he, the Minister, has in mind, is the development which should take place and he can direct that, if application is made, permission shall be granted. In the present case the Minister has decided that he will not allow the building of shops with accommodation over, and that he will not confirm the purchase notice but will allow residential development. It is said that that decision was not within his powers and that the court should quash it.

The question turns on s. 19 of the Town and Country Planning Act, 1947, as amended by s. 70 of the Town and Country Planning Act, 1954. So far as it is relevant, s. 19 (1) is in these terms:

"Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state . . . (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council . . . a notice (hereinafter referred to as a 'purchase notice') . . ."

By sub-s. (2) it is provided:

"Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paras. (a) to (c) of the foregoing sub-section are fulfilled, confirm the notice . . ."

Thereupon certain consequences follow. Then it is provided:

"(a) if it appears to the Minister to be expedient so to do, he may, in lieu of confirming the purchase notice, grant permission for the development in respect of which the application was made or, where permission for that development was granted subject to conditions, revoke or amend those conditions so far as appears to him to be required in order to enable the land to be rendered capable of reasonably beneficial use by the carrying out of

that development; (b) if it appears to the Minister, that the land, or any part of the land, could be rendered capable of reasonably beneficial use within a reasonable time by the carrying out of any other development for which permission ought to be granted, he may, in lieu of confirming the notice, or in lieu of confirming it so far as it relates to that part of the land, as the case may be, direct that such permission shall be so granted in the event of an application being made in that behalf."

Pausing there, it is clear in this case that the Minister was satisfied that sub-s. (1) (a) was fulfilled, namely, that the land had become incapable of reasonably beneficial use in its existing state. It is also clear, though not expressly stated in his decision, that he must have been satisfied in regard to the condition in sub-s. (1) (c), namely, that the land could not be

"rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission."

That being so, *prima facie* he had to confirm the purchase notice subject to the provisos. He did not think it expedient to exercise his powers under proviso (a) to sub-s. (2), but he did say under proviso (b) that he would permit development for residential buildings and that if an application for that was made permission ought to be granted; and if the matter rested there, there would be no question but that his decision was fully within the powers of s. 19. Section 70 (1) of the Town and Country Planning Act, 1954, however, provided that a new sub-section should be inserted after sub-s. (2) in s. 19 of the Act of 1947, and the new sub-section, which is sub-s. (2A), is in these terms:

"In considering, for the purposes of the last foregoing sub-section, whether or not the use of land in any particular state is or would be reasonably beneficial, the Minister shall not take account of the possibility of any development, whether of that or any other land, of any class not specified in sch. 3 to this Act."

It is said that that new sub-section prohibits the Minister from considering under proviso (b) to s. 19 (2) of the Act of 1947 any other development than the development set out in sch. 3 to the Act of 1947. Schedule 3 sets out certain types of development. They are all development for which permission has to be obtained, but they are what are called excepted classes of development on which matters of compensation and other matters in the Act apply. It is sufficient for this purpose to say that a number of developments is provided for in sch. 3, including developments of each of the two types to which the word "development" refers throughout these Acts. It is important to bear in mind that development under these Acts includes not merely physical development, such as erecting buildings, but includes a change of use whether buildings are erected or not. Schedule 3 deals with both types of development and in particular by para. 6 provides for the making of an order by the Minister whereby the use of buildings may be changed, and a number of uses have indeed been prescribed by order under that paragraph.

It is clear that the new sub-s. (2A) of s. 19 of the Act of 1947 applies to the whole of the preceding sub-s. (2). It applies to three considerations. First to the consideration by the Minister whether he is satisfied that the condition in sub-s. (1) (a) has been fulfilled, namely, "that the land has become incapable of reasonably beneficial use in its existing state". I think that is clear because the new sub-s. (2A) says "whether or not the use of land in any particular state" is reasonably beneficial, referring quite clearly to the existing state referred to

in s. 19 (1) (a). It also quite clearly applies by its wording to a consideration whether s. 19 (1) (c) has been fulfilled, namely, whether the land can be rendered capable of reasonably beneficial use in the future, and again by its words it applies directly to proviso (b) to s. 19 (2), the consideration whether the land could be rendered capable of reasonably beneficial use. *Prima facie*, therefore, sub-s. (2A) does bite on and limit the powers of the Minister under proviso (b) to s. 19 (2), and if that is the true view, it is quite clear and admitted that the Minister here has exceeded his powers because the development of this land by the erection of residential buildings would be a development outside the developments set out in sch. 3.

Counsel for the respondent has been forced to admit that *prima facie* the words of the new sub-section do apply to the Minister's power, but he seeks to contend that really on an analysis the new sub-s. (2A) only applies and was only intended to apply to a consideration whether the conditions of s. 19 (1) (a) and (c) have been fulfilled. For my part I think that it may well have been that some such consideration was in mind, but the words plainly refer to proviso (b) to sub-s. (2), and I do not think that it can be said that by applying them to proviso (b) one is nullifying the powers of proviso (b). Counsel for the respondent contended that the effect of the applicants' argument was that the Minister would have no powers under proviso (b) because, it being admitted that sch. 3 development falls to be considered in determining whether the condition stated in s. 19 (1) (a) has been fulfilled, if the Minister is satisfied that no sch. 3 development will make the land reasonably of beneficial use, then when he comes to s. 19 (2) (b) he cannot prescribe any development that will be a beneficial use because he has in effect already determined the question. Counsel for the applicants, on the other hand, points out, and I think that he is right, that that argument overlooks what I have already referred to as the two meanings of development throughout this Act. He admits that the new sub-s. (2A) does apply to the consideration of the condition enacted in s. 19 (1) (a) of the Town and Country Planning Act, 1947, but quite clearly only in regard to change of use; in other words, the Minister can consider sch. 3 change of use in determining whether land has become capable of reasonably beneficial use in its existing state, but he cannot quite clearly consider development of the other class, namely, the erection of buildings because the very condition is directed to an existing state. Accordingly, even though he has considered change of use under s. 19 (1) (a) and determined that no change of use will make the land of reasonably beneficial use, yet when he comes to s. 19 (2) (b) he can consider development in the other sense, for instance, he can consider whether development of the physical kind could make the land capable of beneficial use, and he is entitled to do so provided he only considers development within sch. 3. The words "could be rendered capable" in s. 19 (2) (b), viz., capable of reasonably beneficial use by the erection of buildings or the like, support that view. Thus there is room still for proviso (b) to s. 19 (2) to operate and the words of s. 19 (2A) plainly apply to that proviso. I can see no reason for limiting the words of s. 19 (2A) in such a way as not to apply to that proviso. For my part I think that this application succeeds and the order should go.

CASELS, J.: I agree.

STREATFEILD, J.: I also agree.

Order of certiorari.

Solicitors: *Richards, Butler & Co.; Solicitor, Ministry of Housing and Local Government.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., STREATFIELD AND DIPLOCK, JJ.)

October 20, 21, 1958

LUND v. THOMPSON

Road Traffic—Notice of intended prosecution—Letter from police to defendant stating no further action would be taken—Subsequent letter stating prosecution would be instituted—Validity of original notice—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 21 (c).

On Feb. 11, 1958, the appellant was involved in a traffic incident with his motor car. On Feb. 14 a notice of intended prosecution for dangerous and careless driving, given on the instruction of the Commissioner of Police for the Metropolis, was sent to him. The notice gave all necessary particulars and complied with s. 21 (c) of the Road Traffic Act, 1930. On Feb. 27 the appellant received a letter written on the instruction of the Commissioner stating that "after careful consideration the police had decided not to take any further action in the matter". On March 13 the appellant received another letter, again written on the instruction of the Commissioner, stating that, after further consideration, the Commissioner had decided to prosecute the appellant for dangerous and careless driving. Informations for both offences were preferred against the appellant at a magistrate's court, and the appellant contended that s. 21 of the Act of 1930 had not been complied with as the notice of Feb. 14 had been withdrawn by the letter of Feb. 27. The magistrate held that the notice of Feb. 14 remained valid and was not affected by subsequent events. The appellant then pleaded Guilty to careless driving and was fined for that offence, the information for dangerous driving being dismissed. On appeal by the appellant to the Divisional Court,

HELD, that the notice of intended prosecution having been duly given within fourteen days, the only condition precedent to prosecution had been fulfilled; the notice was not invalidated by the subsequent action of the police, inasmuch as it remained open to any member of the public to prosecute the appellant, and it was not possible to read any such words as "and has not been withdrawn" into the conclusion of s. 21 (c); and, therefore, the magistrate had rightly decided that the notice of Feb. 14 remained valid.

PER CURIAM: It is undesirable that the practice adopted in this case should be followed in other cases.

CASE STATED by Paul Bennett, Esq., a metropolitan magistrate.

Informations for dangerous and careless driving were preferred by the respondent Thompson, a police officer, against the appellant Lund. On Feb. 11, 1958, the appellant was involved in a traffic incident with his motor car at Eaton Gate in London. On Feb. 14 a notice of intended prosecution was served on the appellant, and it was in this form, headed:

"Notice of intended prosecution. Sir, Pursuant to s. 21 (c) of the Road Traffic Act, 1930, I am directed by the Commissioner of Police of the Metropolis to give you notice that it is intended to institute proceedings against you for the following offences:—Driving a motor vehicle in a manner dangerous to the public, driving a motor vehicle without due care and attention, driving a motor vehicle without reasonable consideration for other persons using the road, contrary to s. 11 and s. 12 of the Road Traffic Act, 1930 [then there are the particulars of the occurrence] at about 10.50 p.m. on Feb. 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace."

That was signed by one J. Vaughan, acting police superintendent.

Some thirteen days later, on Feb. 27, another letter was sent to the appellant. That was in the following form: it bore the same reference number as the previous letter:

"Sir, I am directed by the Commissioner of Police of the Metropolis to refer to the incident arising out of the use of motor vehicles [then there are

their registration numbers] on Feb. 11, 1958, at Eaton Gate, S.W.1, junction Eaton Terrace, and to say that, after careful consideration, the police have decided not to take any further action in the matter."

That was signed by one Dix, acting chief inspector of police on behalf of the superintendent. On Mar. 13, a fortnight later, a third letter was sent to the appellant. It was addressed from New Scotland Yard, signed on behalf of the Assistant Commissioner, and was in the following terms:

"Sir, I am directed by the commissioner to refer to the letter of Feb. 27, 1958, sent to you by the superintendent at Gerald Road Police Station, concerning an incident arising out of the use of your motor vehicle [then there are the particulars of the number and place] in which letter it was said that after careful consideration the police had decided not to take any further action in the matter. I am now to say that after further consideration the commissioner has decided to institute proceedings against you for driving in a manner dangerous to the public and for driving without due care and attention contrary to s. 11 and s. 12 of the Road Traffic Act, 1930."

It was contended by the appellant that s. 21 of the Road Traffic Act, 1930, had not been complied with in that the notice of intended prosecution had been withdrawn by the letter of Feb. 27, 1958, and the only effective notice of intended prosecution received by him was the letter dated Mar. 13, 1958, and this was sent more than fourteen days after the commission of the offence alleged. It was contended by the respondent that the notice of intended prosecution was valid and could not be and was not in fact withdrawn.

The learned magistrate was of opinion that s. 21 of the Road Traffic Act, 1930, had been complied with by the original notice of intended prosecution of Feb. 14. The appellant pleaded Guilty to driving without due care and the charge of dangerous driving was dismissed and the appellant was fined £5 and £5 costs. The appellant appealed.

Binney for the appellant.

Machin for the respondent.

LORD PARKER, C.J.: I will ask DIPLOCK, J., to deliver the first judgment.

DIPLOCK, J.: This is an appeal by Case Stated from Mr. Paul Bennett, a metropolitan magistrate, and the facts and point which arise in it are quite short. [His LORDSHIP stated the facts as set out above and continued:] Counsel for the appellant has contended that certain words must be implied in s. 21 of the Act of 1930. Section 21 of the Road Traffic Act, 1930, reads as follows:

"Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving he shall not be convicted unless either—(a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence."

Those three conditions are alternative, and the condition relied on in the present case is condition (c).

The purpose of the section is clear and has been expressed by this court on a number of occasions, namely, that a person concerned in a traffic accident should be informed at an early stage of the intended prosecution so that he can obtain his witnesses and prepare his case. Counsel for the appellant has argued that para. (c) of the section must be read as containing by implication some such words as "notice of intended prosecution was served or sent by registered post to him and has not been withdrawn", or else that the effect of the second letter which I have read is to nullify or cancel the effect of the first notice. A possible alternative way of putting it would be, no doubt, that as the result of the second letter the police were estopped from proceeding with the prosecution.

It seems to us that in the argument of counsel for the appellant there is implicit a fundamental fallacy, viz., that only the police can prosecute for an offence of this nature. That is not so. Although in all but an infinitesimal number of cases, no doubt, information is laid and the prosecution is conducted by a particular police officer, that is not by virtue of his being a police officer: he is exercising the right of any member of the public to lay an information and to prosecute an offence. It therefore follows that when one looks at the three alternative conditions precedent to conviction laid down by s. 21, the warning, the serving of the summons or the giving of the notice of intended prosecution, such warning may be given and such summons may be served or such notice may be given by any member of the public and not merely by a police officer; and that, when such a warning has been given, such a summons has been served or such notice of intended prosecution has been given, anyone who wishes to prosecute may take advantage of it. It would indeed be difficult to argue that, if a person had been warned at the time of the accident under para. (a), a letter written by the police afterwards saying that they did not intend to prosecute would nullify the effect of the warning and so prevent anyone else prosecuting for that offence. It seems to us that the same considerations apply to para. (c) and that it is impossible to read into that paragraph the words which counsel for the appellant seeks to imply. What the paragraph requires is that a notice should be given of intended prosecution, it matters not by whom, within the period laid down by the paragraph and, once that is given, the condition precedent and the only condition precedent to a conviction is fulfilled.

It must not be thought, because we have come to the conclusion that that is the construction of the Act, that the habit of sending a letter to say that proceedings will not be brought and then subsequently sending a letter that the police have changed their mind is a practice to be commended. It is one which may lead in certain circumstances to considerable injustice to the person prosecuted; but, though that may be so, it does not seem to us that we can be induced to read further words into the plain words of the Act. There is this also to be observed, that one of the ultimate sanctions of the rule of law in this country is the right of private persons to lay informations and bring prosecutions. If counsel for the appellant's argument were right, it would be possible for the police to use a dispensing power in relation to an intended prosecution by sending a notice under para. (c) by one post and withdrawing it by the next post. This appeal is accordingly dismissed.

STREATFEILD, J.: I agree, but I confess that I do so with some reluctance. I base my opinion solely on the construction of s. 21 of the Road Traffic Act, 1930; it seems to me, reading the three alternative requirements together, that if a policeman was on the spot when an accident took place and in fact

warned an offender that the question of his prosecution would be taken into consideration, no amount of subsequent intimation that a prosecution was not going to take place would obliterate the fact that he had been warned, which is the only requirement of para. (a). In the same way, if a summons were served within fourteen days and proceedings actually commenced under para. (b), no amount of intimation that the summons was not going to be proceeded with would, as it were, undo that summons. Similarly, under para. (c) where notice has been given of intended prosecution within fourteen days, no amount of cancellation of that notice would obliterate the fact that notice was given. On the true construction of this section all that is required is that either a warning shall be given at the time or proceedings shall be commenced within fourteen days or a notice of intended prosecution shall be given within fourteen days. So long as one or other of those conditions precedent is fulfilled, there is no bar to a conviction. Within the four walls, therefore, of that section I agree that the argument of counsel for the appellant in this court must fail.

At the same time, when one bears in mind that the basis of the requirements of s. 21 is that a person who is accused or who may be accused of an offence under s. 11 or s. 12 of the Road Traffic Act, 1930, may be given fair warning or a fair chance to prepare his defence and to call his witnesses, one sees at once that the allegation or the statement in a printed form that the police have decided not to take any further action after all, having given notice they intend to, may cause an accused person to experience a sense of false security. He may allow his witnesses to disperse to the four corners of the world beyond recall. Then if the police afterwards change their minds and give him notice that they intend to prosecute after all, he may be left in the air so far as his witnesses are concerned. It may therefore be, if that is encouraged, that the purpose of s. 21 may fail. I do not think that there is any question of any injustice having resulted in this case because the appellant in fact pleaded guilty to careless driving and was dealt with on that basis. Of course, some people may even be induced to plead guilty because they have not their witnesses to satisfy the court. It may well be that in this case no injustice has been done, but one can quite conceive that in future there might be a case where a notice of intended prosecution is given and where it is then for all practical purposes withdrawn in plain English and then, if it is reinstated afterwards, it may well work an injustice. One can only say that one can rely, and I am sure with confidence, on the integrity of the police and still more on the integrity of the justices to see that no man in fact suffers injustice through it. One can well sympathise, however, with a man who, having been given a notice, has been served with a purported cancelling notice by precisely the same authority, and then out of the blue there comes another letter from the same authority, the Commissioner of Police, saying that after all he is going to prosecute; one can well understand such a person feeling a sense of grievance. Nevertheless, on a true construction of s. 21 what was done in this case was done within the four corners of s. 21. It is for those reasons, therefore, that I agree with the judgment of DIPLOCK, J.

LORD PARKER, C.J.: With some regret I have come to the same conclusion, and I have nothing to add.

Appeal dismissed.

Solicitors: *Amery-Parkes & Co.; Solicitor, Metropolitan Police.*

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COURT OF APPEAL

LORD EVERSHERD, M.R., SELLERS AND PEARCE, L.JJ.

October 8, 9, 10, 16, 1958

INDEPENDENT ORDER OF ODDFELLOWS MANCHESTER
UNITY FRIENDLY SOCIETY *v.* MANCHESTER CORPORATION

Rates—Limitation of rates chargeable—Friendly society—Society not established or conducted for profit—Benefits payable to non-members—Not organization whose "main objects are . . . concerned with the advancement of . . . social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2, c. 9), s. 8 (1).

The ratepayers were a registered friendly society which had about 600,000 members and large assets. Its rules provided for payments of benefits to members and their families. Benefits were calculated and paid on an actuarial basis, but the society had discretionary power to pay a benefit to a member not otherwise entitled to receive it. The society's income was mainly derived from the contributions of the members and accumulated funds, a relatively small amount being received from other sources which included donations. The society was not established or conducted for profit. On the question whether the rates on a hereditament occupied by the society should be limited pursuant to s. 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the Divisional Court decided that the society was not an organization whose objects were charitable or otherwise concerned with the advancement of social welfare within s. 8 (1) (a). On appeal,

Held: looking at all the main objects of the society as a whole, it could not be said that all its main objects were concerned with, i.e., directed to, the advancement of social welfare, and, therefore, the appeal failed.

Decision of Divisional Court (122 J.P. 1) affirmed.

APPEAL by the ratepayers from a decision of the Divisional Court allowing an appeal by the Manchester Corporation by way of Case Stated by the recorder of Liverpool in respect of his adjudication as a court of quarter sessions sitting at Manchester on Jan. 3, 1957. The Divisional Court held that the main objects of the Independent Order of Oddfellows Manchester Unity Friendly Society were not concerned with the advancement of social welfare within the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), and, therefore, that the society was not entitled to the benefit of the limitation of rates afforded by s. 8 (2) of that Act.

Sir Andrew Clark, Q.C., and Glidewell for the society.

Squibb, Q.C., and Hinchliffe for the rating authority.

Cur. adv. vult.

Oct. 16. The following judgments were read.

PEARCE, L.J.: The appellants are the Independent Order of Oddfellows Manchester Unity Friendly Society (hereinafter referred to as "the society") who occupy premises in Manchester. The rate imposed on those premises took no account of the relief afforded by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, to premises occupied by certain organisations. The society claims that it is within that section and that therefore the premises are entitled to such relief. It appealed successfully to the Crown Court of Manchester, which held that it came within s. 8. On appeal by Case Stated to the Divisional Court that decision was reversed and the society now appeals to this court.

The words of s. 8 (1) which are relevant to this appeal are these:

"This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit

and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It is conceded by the rating authority that the society is not established or conducted for profit in view of the decision of the House of Lords in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1). It is conceded by the society that its main objects are not charitable within the meaning of the Act. This appeal turns on whether the society can show that its main objects are concerned with the advancement of social welfare. If so, its premises are entitled to relief under the section, and this appeal succeeds.

The society was founded in 1851, and in that year was registered under the Friendly Societies Acts. It has various classes of members and many branches. The total number of members is about six hundred thousand. The objects of the society are defined in the rules of the society. *Prima facie* we must look at those rules in order to ascertain the main objects of the society; but where those rules are not clear or decisive the court is entitled to and must consider the actual practice of the society. The book of rules of the society, and the latest available reports dated November, 1955, and March, 1956, are exhibited to the Case Stated and certain relevant facts of the society's practice are carefully set out in the Case Stated.

In *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) the House of Lords had to consider the case of a registered friendly society with about seven hundred thousand members whose objects were (to use the words of LORD KEITH OF AVONHOLM):

"... to provide on a mutual basis for pecuniary benefits of relatively small amounts to be paid to its members on the ordinary chances and changes of human life, such as relief during sickness, provision of facilities in convalescent homes, old age pay and payments to a member's family in the event of his death."

There was also an insurance section providing on a mutual basis for whole life and endowment assurances for the benefit of members. There were certain qualifications for membership, certain restrictions being imposed as regarded health, occupation and age. All the above characteristics are shared by the society in the present appeal. The House of Lords held in that case that the society did not come within the terms of s. 8 since it was established entirely for the common benefit of its members and lacked the element of altruism or public benefit required by the section. Unless, therefore, the society in this case can show that its main objects differ materially from those of the *National Deposit Friendly Society* (1) it cannot succeed in this appeal. Counsel for the society submits that they do so differ by virtue of certain rules and activities which were absent in the *National Deposit Friendly Society* case (1) and that the difference is sufficient to enable this court properly to hold that the society's main objects are concerned with the advancement of social welfare.

There can be no doubt that there are material differences between the two cases. The question that we have to decide is whether those differences are great enough to distinguish this case from the *National Deposit Friendly Society* case (1), and to bring this society within the organisations defined by s. 8 (1) (a). The differences on which counsel relies are these. First, the benefits in the *National Deposit Friendly Society* case (1) were confined to members themselves, whereas the benefits of this society extend to the families and dependants of members. Secondly, the funds in that case were derived exclusively from members'

compulsory contributions. Thirdly, the benefits in that case were calculated on an actuarial basis and thus there was an absence of unselfishness or benevolence, whereas in this case there is an element of discretionary benevolence over and above the actuarial minimum to which members are contractually entitled. The scheme of the society, he says, is that members are contractually entitled to benefits calculated actuarially on the amounts of their subscriptions, and that any surplus after those benefits is not divisible under contractual obligation but is used to provide purely discretionary benefits to members and their families in cases of hardship or need by augmenting contractual benefits and by making payments of a purely personal nature to members or their families: such benefits are eleemosynary in character and outside the purposes of any mutual assurance. There was no such element in the *National Deposit Friendly Society* case (1). He contends that the main objects of this society are the relief or maintenance of members and their families in sickness, in poverty, in distress, in old age and in time of unemployment. All these objects must be the advancement of social welfare. He stresses the element of fraternity throughout which is the basis of rules dealing with the various rituals. The fact (he argues) that the means by which those objects are attained is very largely a system of insurance, designed, in addition to contractual benefits, to provide a surplus for the exercise of benevolence, does not prevent the main objects being the advancement of social welfare although it does prevent them from being charitable in the strict sense. The objects are fraternal and benevolent. The insurance is the means, not the end.

Admittedly the restriction of the benevolence to members and their families is an element to be considered, but in view of the number and wide dispersal of the society's members, he relies on the decision of this court in *Derbyshire Miners' Welfare Committee v. Skegness U.D.C.* (2) as showing that such limitation does not prevent the objects of a society from coming within s. 8, and *Re Buck, Bruty v. Mackey* (3) (later approved in this court) as showing that such benevolence on the part of a friendly society, though confined to a severely restricted class, may be a charity.

Counsel for the rating authority contends that the society, looked at as a whole, has for its main objects the insurance of its members. The *National Deposit Friendly Society* case (1) shows that those objects do not come within s. 8. He canvasses various rules and facts in the case to show that benevolence is incidental rather than essential. Assuming, without conceding, that some of the main objects (e.g., the discretionary administration) are benevolent, the society still does not come within the section. When the Act says the "main objects", it means all the main objects, not one of them or some of them. For this he relies on *General Nursing Council for England and Wales v. St. Marylebone Corpn.* (4), a decision of this court, as showing that a society which had two main objects, one of which was for the advancement of social welfare and one for the benefit of the members, did not come within the section.

We were referred to a number of cases which have decided whether particular organisations come within s. 8 of this Act. The words of the Act are wide and general and it is not easy to decide whether particular cases do or do not fall within those words. Decisions in other cases are not necessarily a guide to what is the correct decision on the facts of a particular case. It seems to be established that the words "or . . . otherwise [for] the advancement of . . . social welfare"

(1) 122 J.P. 399; [1958] 2 All E.R. 601.

(2) 122 J.P. 74; [1957] 3 All E.R. 692.

(3) 60 J.P. 775; [1896] 2 Ch. 727.

(4) 122 J.P. 87; [1957] 3 All E.R. 685.

were intended to connote something more than the mere distribution of money or money's worth simpliciter, even although such distribution rarely fails to be beneficial to the recipient and in that sense to promote his welfare as a member of society. The words seem to me to connote something less material, something of the spirit. This is well expressed by LORD EVERSHERD, M.R., giving the judgment of the court in *General Nursing Council for England and Wales v. St. Mary-lebone Corpn.* (1):

"But, if we can add anything to illustrate the limitation which, we think, should in this context be put on social welfare, it would be that the phrase involves at any rate the conception of what used to be called 'good works': the notion of things that, as a matter of social obligation, ought to be done for the benefit of those in the community whose living conditions in those respects are inadequate. We suggest this, not by way of definition, but only as an indication why, in our judgment, the advancement of social welfare ought not to be equated with the promotion, generally, of the well-being, in every sense and of every kind, of society or sections of society; why, therefore, everything which can be shown to tend to the public advantage cannot, for the purposes of the section, be treated as concerned with the advancement of social welfare . . ."

Further, the words "main objects" must, in my opinion, mean in substance all the main objects. The test is this. When one looks at the society fairly as a whole, can it be said that its main objects (not merely one or some of its main objects) are concerned with (i.e., directed to) the advancement of social welfare? Rule 2 defines the objects of the society. It reads:

"The objects of the society shall be: To provide by entrance fees, contributions of the members, fines, donations, levies, and interest on capital for—(a) Insuring a sum of money to be paid on the death of a member or of a member's wife or husband or, subject to s. 2 of the Act of 1948, of a parent, step-parent or grand-parent of a member or, subject to s. 1 of the said Act, for the funeral expenses of a member's child or of the widow of a deceased member. (b) Insuring a sum of money to be paid on the birth of a member's child. (c) The relief or maintenance of the members, or in the cases hereinafter, or in the rules of any branch, provided, the wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans or members, during sickness or other infirmity, whether bodily or mental, in old age, or in widowhood. (d) The relief or maintenance of the orphan children of members during minority. (e) Providing proper medicine and medical attendance for members. (f) Granting temporary assistance to the widows and children of deceased members. (g) Providing members with assistance when travelling in search of employment. (h) Assisting members when in distressed circumstances, and for making grants to members who may be incapacitated by accident from following their usual employment. (i) Assisting branches unable to meet their engagements. (j) The endowment of members at any age. (k) Guaranteeing the performance of their duties by the officers and servants of the Order or of any branch thereof. (l) To provide convalescent treatment and to provide and maintain convalescent homes. (m) Insuring, to members of the Jewish persuasion, the payment of a sum of money during the period of confined mourning."

Some of those objects are, in vacuo, charitable. Some may be charitable.

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describe what the members are bound to contribute to secure their benefits) and also from fines, donations and levies. Persons join the society and contribute to its funds in order to obtain for themselves or for the class of persons mentioned in r. 2 (c) such benefits as the society disburses under its rules as of right or by way of discretion. The benefits available to members as of right are only payable provided the contributions of such members have been paid or dealt with in accordance with the rules. Rule 156 shows that members have to be proposed, elected and initiated with a ceremony whose ritual is designed to stress the fraternal nature of the bond; but the declaration which has to be signed by a candidate shows a concern with those matters such as his health and that of his wife, whether he is temperate, whether he or his parents have suffered from pulmonary disease, a concern which is normally associated with ordinary commercial insurance.

The rules provide for the formation of various funds for benevolent purposes: an orphan gift fund (partly from donations and partially from a levy), a convalescent home fund, a war distress fund. Rule 70 provides that, when a surplus of assets over liabilities is shown at a quinquennial valuation, the surplus may be appropriated to these benevolent funds (r. 70 (9)) or to funds for providing various additional benefits for the member or his wife (r. 70 (10)). These are discretionary in character. In 1954 the funds were about £34,000,000, and the surplus, namely, £3,801,000 was appropriate in accordance with r. 70. At least £1,000,000 has been so appropriated, a sum which, spread over the five-year period, represents an average of £200,000 a year. In order to see the perspective the following figures are useful. The accounts are not easy to follow, but it emerges on analysis that the society's income is about £1,700,000 (of which donations and sources other than interest on capital and contributions produce £56,000, which is about three per cent. of the total) and its expenditure is about £1,600,000. So far as I can see from the accounts, the discretionary benevolent distributions are between £200,000 and £300,000 per annum. Those to whom they are distributed are the members or their families or dependants who qualify as beneficiaries of the benevolence through the contractual link between the society and the member. The distributions are none the less discretionary acts of benevolence.

Such is the general outline of the organisation in respect of which we have to decide whether its main objects are the advancement of social welfare, starting with the premise that mutual insurance against the vicissitudes of life is not concerned with the advancement of social welfare. I accept that *an* object of the society is benevolent and discretionary succour to members and their families according to their need, and that *an* object of the society is the instilling into members by ritual or otherwise of a feeling of fraternity that goes beyond the mere mutuality of a financial interest in one another or the esprit de corps normally promoted by a large business enterprise. Whether these can be properly styled "main objects" I feel some doubt. The main and dominant objects appear to me to be mutual insurance of the members and the benefits to which they are entitled as of right. These are not the means to a benevolent end: they are the end itself. I do not wish to belittle the benevolent and fraternal objects to which I have alluded. They are, no doubt, of the utmost importance to some members and not unimportant to the majority, but they are not the main objects of the society. Therefore, in my view, the society is not one whose main objects are concerned with the advancement of social welfare. I would, therefore, dismiss this appeal.

LORD EVERSHED, M.R.: In light of the judgments already pronounced on the imprecise formula of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which are binding on this court, and particularly of the decisions of

this court and the House of Lords in *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1), counsel for the society felt constrained to present the case for the appellants (hereinafter referred to as "the society") as one which could and should be distinguished from the *National Deposit Friendly Society* case (1) on the ground that, notwithstanding the common mutual insurance characteristic, certain of this society's rules, having no counterpart in the National Deposit Society's constitution, imported an eleemosynary or benevolent quality of sufficient significance to give to the society a "social welfare" complexion distinct from the purely "business" colour of the National Deposit Society. Thus counsel emphasised the rules relating to the benevolent committee (r. 21), the orphan gift fund (r. 28), the unity distress fund (r. 35), the convalescent home benefit fund (r. 34 in the amending rules), the unity war distress fund (r. 35a), meritorious service pensions (r. 38a), Collins memorial fund (r. 38b); the rules relating to the appropriation of surplus capital (r. 70), to Odd-fellows' Halls (r. 79), and to ritual and regalia (r. 82); and the special district and lodge rules relating to the district distress funds (r. 107b) and lodge benevolent funds (r. 163) respectively. Founding himself on such considerations and on the terms of the objects rule (r. 2) itself, counsel for the society forcibly contended that the benefits and purposes of the society were not confined, as were those in the *National Deposit Friendly Society* case (1), to the provision of such disability and other like payments to members only and as a matter of contractual right, but extended to payments that are supplementary and discretionary and to persons other than members, viz., persons who may broadly be classed as the families of members. Counsel for the society further drew attention to the circumstances that the income of the society is not exclusively derived from contributions (or from the very substantial investments made from savings) but includes voluntary donations and that purely charitable grants are within the power of the society's trustees; and he finally and most naturally emphasised that the provisions as to initiation and the like showed that those who joined the society must be taken to accept an ethical consideration of brotherhood as a basis of their association.

I am far from saying that these matters do not constitute an important addition or qualification to what may be called the "business" aspect of the association (viz., mutual insurance) which is comprised in the first of the objects enumerated in r. 2. But I have come to the conclusion on the whole that they would not justify us in distinguishing this case from the *National Deposit Friendly Society* case (1) according to the principles therein laid down. I shall not, I hope, be thought unappreciative of the arguments put to us if I express my conclusion shortly. To do otherwise would inevitably involve some further attempted exposition of the Parliamentary formula and thereby add to the citations in the other cases (not likely to be few) which will have to be considered—a process which would not, I think, be to the public benefit, tending to substitute argument on the judgments of the courts for application of the few words, simple if elusive, "... whose main objects are ... concerned with the advancement ... of social welfare". The opinion of the noble Lords rejecting the appeal of the National Deposit Friendly Society, and the judgment of this court in the same case expressed by PARKER, L.J., have emphasised the significance—and the limiting effect—of the words "concerned with the advancement of": the main objects (and not merely some of them) must be directed to the furtherance or promotion of social welfare, that is, as an end or an altruistic conception. See, e.g., the speech of LORD KEITH OF AVONHOLM:

"The desire for protection in time of need is the common bond that has brought them together. That is a most laudable object, but I find it impossible to distinguish their organisation in any essential respect from any mutual insurance society which provides similar, if more enlarged, benefits for a wider and more diverse cross section of the community."

LORD MACDERMOTT, in the same case, said:

"The principle, as I understand it, is that a valid charity must be substantially altruistic and benevolent in its purposes. That quality, which is, of course, but one facet of legal charity, appears to me to be reflected in the word 'advancement' as used in the paragraph in question, for there it seems clearly to be used as it is commonly used in relation to what is charitable, and, so used, I think it must be construed as implying a desire to do good to others. If, then, as I would hold, that is the nature of the quality which links and runs through the categories mentioned in s. 8 (1) (a), it remains to inquire whether the objects of the society possess or lack this quality."

In my judgment, the society fails to satisfy the test. The learned recorder fairly summarised the purposes of those who join the society in the Case Stated:

"That persons joined the society and contributed to its funds in order to obtain for themselves or for such class of persons as mentioned in (m) above such benefits as the society disbursed under its said rules as of right or by way of discretion."

Highly laudable though the society's main objects be, they at least significantly include mutual insurance for protection in time of need and in my opinion the result is not affected for present purposes by the fact that the benefits may extend to his family as well as to the member and may not be confined to the contractual minima.

Counsel for the society in his reply urged that the main objects of the society were relief of members (and their families) in sickness, poverty and distress, and their maintenance in old age and when out of work, and that the mutual insurance characteristics were but means to those ends. But such an analysis would surely be no less capable of invocation in a case strictly comparable to the *National Deposit Friendly Society* case (1). To treat the mutual insurance characteristics as "means" only is, in my judgment, to disregard the words "concerned with the advancement of . . .", which the House of Lords has held to be essential to the proper application of the statute. I agree, accordingly, that the appeal should be dismissed.

SELLERS, L.J.: The resemblance of the present case to that of the *National Deposit Friendly Society (Trustees) v. Skegness U.D.C.* (1) is apparent and the argument has been developed very largely by both sides by making a comparison, on the society's side to emphasise the differences, on the rating authority's to demonstrate the similarities, in the two cases. It is not, perhaps, the most attractive way of considering a case, but, as the law has so recently been reviewed and pronounced by the House of Lords and the Court of Appeal in the cases which have been cited, it seems to me to be not only permissible and reasonable but also necessary to do so.

Counsel for the rating authority relied strongly on r. 156, which, if not, as they asserted it was, the key to the whole matter, does show that a main and outstanding object of the society is insurance on a contractual basis. Rule 156 (1) is as follows:

(1) 122 J.P. 399; [1958] 2 All E.R. 601.

"Any person of good character, sound health, and within the age limits applicable to the respective tables contained in the general rules, or as stated in the lodge or district special rules, may become a member."

Sub-rule (2) contains a form of declaration to be signed by every candidate for admission to the society which includes an affirmation:

"that I am not afflicted with any hereditary disease tending to cause prolonged sickness or to shorten life"

and in respect of a candidate's wife "... that she is also of sound bodily health and good constitution". Sub-rule (3) requires that the declaration must be accompanied by a certificate of health signed by a medical practitioner if it is required by district or lodge. Sub-rule (5) deals with the candidate's wife's health, and in sub-rule (6) there is a form of declaration in lieu of a medical certificate, requiring answers to questions all directed to the applicant's health or the health of his parents or family, and the last question is (g):

"Have you ever been admitted, or proposed to be admitted, a member of this or any other sickness benefit society?"

It would seem on the information available and viewed as a whole that the main activity of the society is sickness and life insurance of the members and through them of their families and specified classes of relatives.

In the conduct of this class of business over the years, with a care and prudence commonly associated with such insurance on a purely business basis, the society has built up reserves of no less than £34,000,000. I would not seek to belittle the society's purely benevolent provisions, which are substantial in terms of money; but they have been sufficiently restrained year by year to permit this great accumulation of capital. Even the substantial voluntary payments go unaccompanied, it would seem, by any friendly or neighbourly ministrations of an individual or personal character and, therefore, lack a not unimportant element in social welfare.

As it has been laid down that all the main objects must fulfil one or other of the requirements of s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in order to bring the hereditament within the provisions for special relief, then I think this society fails to qualify. It cannot be held, in my view, in the light of the decided cases, that all the main objects of the society are "otherwise concerned with the advancement of social welfare". I add these observations to the judgments of my Lords, which I have read and with which I agree. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Forsyte, Kerman & Phillips*, for John Gorna & Co., Manchester; *Sharpe, Pritchard & Co.*, for Town Clerk, Manchester.

F.G.

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